Jurisdictional Statement

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ALEXANDER L. STEVAS,
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81-960

No.

IN THE

Supreme Court of the United States

October Term 1981

RONALD C. LOCKE and LESLIE L. FLAGE,
Appellants,

v.

STATE OF FLORIDA,
Appellee,

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

JURISDICTIONAL STATEMENT

LARRY G. TURNER
Counsel of Record
THOMAS W. KURRUS
Law Office of Larry G. Turner, P.A.
204 West University Avenue
Suite 6
Post Office Box 508
Gainesville, Florida 32602
(904) 375-4460

MICHAEL L. BRYANT
JACK M. ROSS
Law Office of Birr, Bryant & Saier, P.A.
204 West University Avenue
Suite 4
Post Office Drawer 1168
Gainesville, Florida 32602
(904) 375-1000
Attorneys for Appellants

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QUESTIONS PRESENTED

The question raised by this Appeal[1] is whether a state, by statute, may constitutionally employ a scheme of severe, minimum mandatory prison sentences and fines to compel criminal defendants to serve as informants for law enforcement agencies with no coextensive grant of immunity from prosecution for providing incriminatory information.

This Appeal contemplates several additional questions, which, by the synergistic nature of the Statute sought to be reviewed, should be considered by this Court to be one broad question of interrelated parts, as

[1]All designations styled (a1, a2,...) are to pages in appendix. There are no parties to the proceedings in the court whose judgment is sought to be reviewed other than those contained in the caption of this Appeal, with the single exception of Jim Smith, Attorney General of the State of Florida, The Capital, Tallahassee, Florida, 32301.

well as separate components to be scrutinized independently. Those questions are:

May a state, by statute, constitutionally inflate mandatory penalties for the express purpose of forcing defendants to provide information that is necessarily self-incriminatory, with no immunity, and a concommitant inducement that the state will, at the sole option of the prosecutor, deflate the penalty if the defendant's performance is "substantial"?

May a state constitutionally employ the above procedure whereby the prosecutor, alone, is empowered to initiate mitigation?

May a state constitutionally employ the above procedure whereby the defendant is deprived of all procedural safeguards of Due Process and the prosecutor is not subject to guidelines or restrictions while the trial court is precluded from intervention?

Does *Roberts v. United States,* 445 U.S. 552 (1980), empower a state to constitutionally (1) preclude the sentencing judge from looking at mitigating factors, and (2) create an implied statutory presumption that the defendant is able to provide "assistance" to law enforcement, and (3) create an implied statutory presumption that the defendant's failure to provide the "information" is evidence of incorrigibility, when (4) the defendant is precluded from rebutting the presumptions, explaining his silence, or asserting his Fifth Amendment privilege against self-incrimination?

OPINIONS BELOW

The Opinion of the District Court of Appeal for the First District of the State of Florida. which appears at page (a-1) of the appendix, is reported at 402 So2d 618 (Fla. 1st DCA 1981). Rehearing was denied, 21 August 1981, by Order of the Court, also appearing in the appendix at page (a-6). In ruling upon the instant case, the First District Court of Appeal *per curiam affirmed* the Order of the Circuit Court, Third Judicial Circuit, Dixie County, Florida, entered 19 March 1980, which denied Appellants' (Defendants, below) Motion to Dismiss Counts I and II of the Information. The Order of the Circuit Court is reproduced at page (a-106) of the appendix.

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JURISDICTION

The proceeding giving rise to this Appeal was brought by the Appellants on appeal to the District Court for the First District, State of Florida. The First District Court was asked to review, *inter alia*, the trial court's Order holding Section 893.135, Florida Statutes (1979) constitutional and, therefore, its denial of Appellants' Motion to Dismiss Counts I and II of the Information charging Appellants with violating that statute. Appellants renewed their challenges to the constitutionality of the statute, and submitted briefs to that effect, to the District Court of Appeal. See pages (a-106p - a-106t) of appendix. However, before The State of Florida filed its ANSWER BRIEF OF APPELLEE, the Supreme Court of Florida rendered its decision in *State v. Benitez*, 395 So2d 514 (Fla. 1981), upholding the statute as constitutional under both the Florida and United States Constitutions. (The *Benitez* decision appears at pages (a-7 - a-15) of the appendix). Citing the recent *Benitez* decision, Appellee concluded, on brief, that "Appellants" claim has been answered dispositively in contravention to his position, (therefore) the State would move that the trial court's finding of Section 893.135 as constitutional be affirmed." ANSWER BRIEF OF APPELLEE at page 21, in appendix at (a-106u). Affirmance was entered, *per curiam* (without opinion) by the District Court of Appeal on 22 May 1981. Pursuant to the express terms of the Order, it was not final until time expired to file Rehearing Motions, and disposition if filed, which, after timely filing, was, by Order of the court, denied on 21 August 1981. The Supreme Court of Florida lacks jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion. Article V, Section 3(b) (3) of the Florida Constitution (as amended, effective 1 April 1980) (a-39); *Jenkins v. State*. 385 So2d 1356 (Fla. 1980); *see Nash v. Florida Industrial Com.*, 389 US 235, 237 & n.1 (1967). A timely NOTICE OF APPEAL to this Court was filed on 1 October 1981. (a-29).

Because Appellants have drawn into question the validity of Section 893.135, Florida Statutes, under the con-

stitution of the United States, both as the statute is applied in the prosecution of Appellants and as to its facial validity, and because the decision below sustained the validity of the statute, this Court has jurisdiction under 28 U.S.C., Section 1257(2). *Mills v. Alabama*, 384 US 214 (1966); *Cox Broadcasting Corp. v. Cohn*, 420 US 469 (1975). *See also, Harris v. Washington*, 404 US 55 (1971).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes, controlling the disposition of this cause, are lengthy. See Section 893.135, Florida Statute (1979) and Amendments V, VIII, and XIV to the Constitution of the United States. The pertinent text of each, set out verbatim, appears in the appendix at pages (a-31 - a-39).

STATEMENT OF CASE

A. Facts

As newly-elected Governor, Bob Graham celebrated his first legislative conquest on April 6, 1979, by signing into law Florida's reply to the "embarrassing national publicity" concerning the state's estimated $5 billion per year drug-trafficking industry. (a 297). It was the first law passed during the 1979 session, rammed through the legislature in two days, in response to the CBS-TV "60 Minutes" broadcast depicting Florida as the nation's major entryway for drug smugglers. (a 299). The Criminal Justice Committee staffs of both the House and Senate had provided Florida's legislators with a brief analysis of the proposed law, described as a statute to create informants. (a 251). The legal analysis by the House Committee's staff was less than exhaustive: "The bill appears to be constitutional". (a-233). The Senate Committee staff report failed to tender any conclusion. In the words of the Supreme Court of Florida, the "Legislators *knowingly* glossed over alleged constitutional defects in the approach that was being developed" to compel drug violators to become informants. *State v. Benitez*, 395 So2d 514, 517 (Fla. 1981) (emphasis supplied).

The legislative history of Section 893.135, Florida Statutes, reflects the court's characterization, above, and reveals that lawmakers gave primary consideration

enacting a statutory "rubber hose" for use on defendants who had refused to cooperate at the plea bargain stage, regardless of the defendant's reasons. Once convicted, according to the statute's design, no reasons--including those purportedly preserved by the Constitution of the United States--would be acknowledged by the state to outweigh its demand for informants. Subsection (1) of the statute establishes severe mandatory minimum sentences and fines for trafficking in illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding adjudication of guilt or imposition of sentence on a person convicted under this experimental law. It also eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides what is euphemistically called an "escape valve" from these admittedly harsh penalties: The court is permitted, solely upon the initiative and discretion of the prosecuting attorney, to reduce or suspend sentence if the defendant has rendered "substantial assistance" in the identification, arrest, or conviction of accomplices, accessories, co-conspirators, or principals. Section 893.135 (3), Florida Statutes (1979). *See Benitez, supra* at 516-17.

On October 23, 1979, deputies of the Dixie County Sheriff's Department entered and searched a wooded area, privately owned by someone not an Appellant herein. The officers had suspected marijuana was being cultivated on the land and, as a result of the search, were able to confirm those suspicions by finding what appeared to be a marijuana farm. However, a quarter of a mile away, visibly obstructed by dense woods, was a mobile home in which appellants resided. Appellants, not home at the time, immediately and voluntarily surrendered themselves to the authorities upon being advised that they were sought by the police.

Appellants were arrested and each was charged by *INFORMATION*, with possession of 10,000 pounds of cannabis in violation of section 893.135, Florida Statutes. This forced the Appellant's to confront the "Hobson's choice" created by the Florida legislature: either *forfeit several fundamental rights* guaranteed by the United States Constitution, not the least of which is the Fifth

Amendment privilege against self-incrimination, and, in addition, *serve as police informants;* or, face the sobering threat of a mandatory minimum[2] prison term of fifteen (15) years with no opportunities for parole, despite any proof of "first offender status". In addition, each Appellant was staring at a minimum fine of $200,000, with no possibility of reduction, unless they complied with the above demands. See section 893.135 (1) (a) 3, Florida Statutes.

B. Proceedings below

In January, 1980, each appellant filed a *Motion to Dismiss Count I and II of the Information,* urging that the pertinent charges were founded upon a constitutionally defective statute, and setting forth the questions sought to be reviewed by this Tribunal. (a-40, a-46a). A MEMORANDUM in support of the Motion to Dismiss was submitted to the Court, on 30 January 1980, elaborating on each point enumerated herein. (a-47). After reviewing memoranda of law, and in consideration of arguments of counsel, the trial court *DENIED the MOTIONS TO DISMISS* on 19 March 1980. (a-106).

Faced with the horns of the dilemma of either serving as police agents with all the attendant risks and sacrifices, or the equally unpalatable alternative of an inflated prison term for refusing to do so, Appellants negotiated a plea in which they were permitted to appeal to this Court. The plea, nolo contendere to attempted trafficking in excess of 100 pounds of cannabis, was entered on May 13, 1980, with each Appellant specifically preserving his right to appeal the constitutionality of the statute inducing the plea. (a-106a - a-106n).

An Appeal was taken to First District Court, State of Florida. On brief, both Appellants raised the questions before this Court and asked for relief. (a-106p). Before

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[2]This is a minimum with "no sentence cap". Appellants were confronted with the stark reality that defendants in a similar case, upon pleading nolo contendere to possession of 2,100 pounds of cannabis, recently were imprisoned for thirty (30) years and fined $2.2 million. They refused to become police agents. See "Transcript of Motion For Severence and Sentencing Proceedings", before R.A. Green, Jr., Circuit Judge, Bradford County, Florida, in *Ortiz et al. vs. State,* in Appendix at (a-309).

the State--as Appellee--responded, the Florida supreme court issued its determination that the challenged statute is constitutional and, by opinion, disposed of each argument preserved by Appellants. *Benitez, supra,* in Appendix at (a-7). Upon being advised of this, in the ANSWER BRIEF OF APPELLEE, the First District Court of Appeal summarily affirmed the trial court's orders, without opinion. (a-1). Motions for rehearing were timely filed and, by order of the First District, denied on 21 August 1981. (a-6).

Appellants were incarcerated, pursuant to mandate, with Appellant LOCKE to serve ten (10) years imprisonment and Appellant FLAGE eight (8) years. On October 1, 1981, both timely filed a NOTICE OF APPEAL with this Court. (a-29).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL ONES WHICH HAVE NOT PREVIOUSLY BEEN CONSIDERED BY THIS COURT.

I. The Privilege Against Self-Incrimination

Make no mistake about it. Florida has declared war against drug smugglers. Faced with an enemy both embarrassingly familiar and prominent, the State designed a novel weapon--"Florida's Trafficking Statute."[3] Engineered in blind haste to be publicized statewide as the Governor's first decisive victory upon taking office,* the trafficking statute makes the traditional arsenal of penalties for drug-law violations pale by comparison. (a35-a37). It strikes a hard blow. Hard and foul; reaching into the heart of our Constitution and virtually gutting it of meaning.

The weapon--a statutory vicegrip[4]--literally locks the accused to an imponderable choice: either suffer a

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[3]Section 893.135, Florida Statutes (1979), at pages a35-a37 in appendix.

*Now, on the eve of his re-election campaign, the Governor no longer embraces this statute as the solution to Florida's drug problem. He has shifted the blame for losing the battle to a lack of federal dollars. (a 322).

[4]In the words of State Rep. Martinez, describing the trafficking

grossly *inflated* prison term, with no chance of parole or judicial intervention; or, alternately, surrender constitutional rights and "squeal". (a 239). The bait -- the possibility of a dramatically *deflated* sentence, with a chance of outright freedom, if the accused knuckles under and turns "informant".

In straightforward terms, may Florida, by statute, Constitutionally employ a scheme of severly inflated mandatory prison sentences and fines to compel criminal defendants to serve as "informants" for law enforcement agencies?

The frenzied nature in which this statute was enacted underscores its constitutional infirmities. In 1978, a "trafficking" bill died in committee. It simply was not a "pressing issue". In 1979, after "embarrassing national publicity" labeling Florida as an entryway for drug smugglers, political panic spread from the Governor's mansion to the House and the Senate. The bill, prepared by the Governor's office, raced through both houses in the first two (2) days of the session.[5] Several legislators expressed concern because of the "emotional issues" underlying the law, and counseled against such haste. But the need to get the new law on the books and onto the front pages of the state's newspapers prevailed.

The "trafficking statute", now in full force, is divided into three (3) synergistically dependent parts: Subsection

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statute: "it's like one of these little tools I was using, a clamp to fix a drawer at the house, and I turned the clamp just one more turn and it snapped, because I tightened it too much. I'm afraid that this clamp we think we're imposing will backfire, and we're going to be right back where we are, and we've lost a tool. ... I don't see anything wrong with giving it some consideration, and we do have a thing known as due process. I just think that this falls a little short of that..." (a263).

[5]A version of the bill which became Section 893.135, Florida Statutes (1979), had been in committee during the 1978 legislative session. Senator Childers said, but "at that time we did not feel it was a pressing issue to be brought before the Senate." (a-286).

The Miami Herald, in a series of articles published by the statewide newspaper during the 1978 legislative session, reported that drug importation has become Florida's top-dollar industry.

Later, in 1979, the CBS network news program "60 Minutes" broadcast the same information to the nation. The "issue" suddenly became pressing. (a299).

(1) of the statute erects severe mandatory minimum sentences and fines, with no cap, for trafficking in drugs. Subsection (2) prohibits the trial court from suspending, deferring or withholding adjudication of guilt or the imposition of sentence. In addition, it eliminates any chance of parole despite proof of first offender status or other mitigating criteria. Subsection(3) offers what is auspiciously described as an "escape valve" for the accused. It grants jurisdiction to the trial court, solely upon the initiative and discretion of the prosecuting attorney, to reduce or suspend the excessive penalties if the defendant has rendered "substantial assistance" in the identification, arrest, or conviction of accomplices, accessories, co-conspirators, or principals. (a35-a37).

The purpose and effect are obvious. The lawmakers were not concerned with camouflaging their intentions. According to State Representative Crawford:

> "The real thrust of this thing is to try and make sure that ... the prosecution has enough of a hammer over that person's head to make them talk."

(a - 132). Voices of colleagues in both houses echoed this sentiment.[6]

Despite the trafficking statute's vivid impact on the accumulation of constitutional rights, including the Fifth Amendment privilege against self-incrimination, it survived judicial review by the Florida supreme court. That court, in *State v. Benitez*, 395 So2d 514 (Fla. 1981), rejected the argument that section 893.135 coerces a defendant into relinquishing any Fifth Amendment right. *See, Benitez* at 519. in appendix, pp. (a7-a15). The court concluded, "nothing ... suggests that 'substantial assistance' must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no Fifth Amendment privilege is obviously necessary)." *Id.*

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[6]State Senator Spicola concluded: "then the whole incentive, the whole object of the bill, (is) to make him cooperate ..." (a278).; State Representative Beard speculated on the force of the law had he been armed with the statute when he was a sheriff: "I think it

This presupposes either that the defendant's rights evaporate before appeal[7] or that there is no possibility of reversal, remand and retrial.[8] In addition, the Florida supreme court's reasoning assumes that the Double Jeopardy Clause of the Fifth Amendment protects against prosecution by a separate sovereignty, contrary to *United States v. Wheeler,* 435 US 313 (1978). Moreover, there is a myriad of related state crimes[9] against which the defendant is not immunized despite conviction for trafficking.[10]

would have been a weapon that we could have used to make them talk." (a-257).

[7]Numerous courts have held that individuals retain important Fifth Amendment rights against self-incrimination even after conviction. e.g., *United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974); *United States v. Metz*, 608 F.2d 147 (5th Cir. 1979); See *Malloy v. Hogan*, 378 US 1, 12-14 & n.9 (1964).

[8]Should a successful appeal transpire, and a retrial occur, the defendant's statements would constitute admissible evidence against him in the later proceedings. See, for example, hearsay exception for former testimony and statements against interest. Florida Evidence Code, Sections 90.803 (18), 90.804 (2) (a), and 90.804 (2) (c); and Federal Rules of Evidence, Sections 804 (b) (1), and 804 (b) (3).

[9]One obvious offense is a controlled substance conspiracy in violation of Section 777.04 (3), Florida Statutes (1979). See, *Goldberg v. State*, 351 So2d 332 (Fla. 1977). The same information could be used to prosecute for participating in an "enterprise" through a pattern of racketeering activity "relating to drug abuse prevention and control" in violation of the Florida RICO Act. See Section 943.46 *et seq.*, Florida Statutes (1979).

[10]As a practical matter, there is no limit on the range of crimes about which the prosecutor may interrogate the defendant. The State in its brief to the Florida supreme court, in *Benitez*, argued (apparently not in jest) that "a proper and narrow reading of the statute...restricts its *facial application* to the crime of 'trafficking" ...if the defendant wishes to 'spill the beans' on any other crimes at other times, in which he may have been involved or may have seen, --that choice is his to make." (Brief at 30).(emphasis added). Surely if the statute's mandatory penalties were required to force the defendant to provide law enforcement information concerning a crime for which he has already been convicted, it is highly improbable that the defendant would spontaneously "wish" to confess to other crimes, unless by so doing he would profit by mitigation of sentence. Thus, while the "facial application" of substantial assistance may be limited to the crime for which the defendant has already been convicted, the practical application of the "substantial assistance" provision clearly is not.

The Florida supreme court, in *Benitez*, acknowledged the risk of prosecution in other jurisdictions, but summarily disposed of that threat by suggesting "nothing in the statute is compulsive". Florida lawmakers have simply put the defendant to a "difficult choice". 395 So2d at 519.

In so ruling, the court underestimated the success of the legislative design, calculated to confront the accused with a "Hobson's choice": either gamble for leniency, speak, and run the risk of additional prosecution; or remain silent and face excessive penalties, inflated to an intolerable degree for the single-minded purpose of prying evidence of crime from the accused's lips. State Senator Spicola, as the sponsor of the amended bill, explained:

> "The reason for the bill is to make the penalty stiff enough that ... it's going to make it worth his while (to talk)."

(a - 292). [11]

Notwithstanding the contradictory legislative intent, the Florida supreme court, in *Benitez*, concluded there is no element of coercion.[12]

Such reasoning defies common sense, as well as the conceded objective of the legislation, and either ignores or attempts to deviate from a long list of opinions published by this Tribunal.[13] Surely the facade is obvious. The legislators "giveth" so they could "taketh away". The penalties were originally *inflated to be deflated*, to avoid the "enhancement" problem. The unmistakable ploy produces the appearance of offering a "reward" for surrendering a constitutional right, while actually

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[11] State Representative Haben opined: "If you told him it's going to be fifteen (15) years in (prison) without a possibility of parole or probation, he's not going to spend fifteen (15) years in (prison), he's going to turn state's evidence." (a237). Mr. Haben's colleague, Representative Martinez, described it in plain and simple terms: 'You are hitting the guy with a rubber hose." (a133).

[12] "No constitutional deprivation results if a defendant elects to reap the benefits." In effect, the defendant merely faces a "gratuitous sentence reduction" which is not tantamount to "enhancement" of a sentence for remaining silent. *Benitez, supra* at 520.

[13] Statutory provisions that unnecessarily or excessively

punishing its rightful retention. Moreover, the Florida supreme court's distinction between "enhancement" and "denial of leniency" is dubious indeed; particularly in light of this Court's express reservations about the ability to discern any such "principled distinction". *Roberts v. United States*, 445 US 552, 557n.4 (1980).

In short, Florida's trafficking statute, as drawn and applied, makes assertion of the Fifth Amendment privilege "costly". The price exacted is years behind bars.

When stripped of its veneer, the statute emerges as a codification of dicta in *Roberts*,[14] but extended beyond constitutionally acceptable boundaries. The Florida supreme court has interpreted *Roberts* as providing express approval, by this Court, of the use of the challenged statute's exaggerated penalties to wring incriminating information from defendants with no coextensive grant of immunity. Judicial inquiry into the motive for "refusing to talk" is apparently unnecessary. The *Benitez* court simply rested on the barren conclusion, selectively extracted from *Roberts'* dicta, that a defendant's refusal to cooperate is a "factor" for sentencing consideration.

The unfounded extension of *Roberts*, by *Benitez*, is distressing for several reasons. First, the Florida legislature never intended for sentencing judges to consider proper sentencing "factors". In fact, the trial court is expressly prohibited from looking at any traditional sentencing criteria--particularly favorable criteria.

Second, if failure to render "substantial assistance" is properly contemplated as an "aggravating factor", it is presumed and "built-in" to the mandatory penalty. The

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"encourage", though not rising to the level of "compelling" the waiver of fundamental rights, are unconstitutional. *United States v. Jackson*, 390 US 570 (1968). There are rights of a constitutional stature whose exercise a state may not condition by the exaction of a price. *Garrity v. New Jersey*, 385 US 493 (1967); *Lefkowitz v. Turley*, 414 US 70 (1973); *Gardener v. Broderick*, 392 US 273 (1968); and *Sanitation Men v. Sanitation Comm'n.*, 392 US 280 (1968). This includes "any sanction which makes the assertion of the Fifth Amendment privilege 'costly'." *Spevak v. Klein*, 385 US 511, 515 (1967).

[14] "...the criminal defendant no less than any other citizen is obliged to assist authorities." *Roberts, supra* at 558.

accused, under Florida's experimental law, is presumptively incorrigible with no opportunity to rebut the presumption or explain his silence under the bifurcated sentencing procedure in section 893.135.[15] Unlike the petitioner in *Roberts*, the Florida defendant has no forum in which to explain his motives for silence--including his Fifth Amendment claim--except behind prison walls.[16]

Third, the *Roberts* opinion advised that, while the petitioner's Fifth Amendment claim was not properly preserved, "it would have merited serious consideration" if the privilege had been "properly presented to the sentencing judge". 445 US at 559. Florida defendants enjoy no such consideration. Florida's unique sentencing structure precludes it. The legislature, having divested the court of jurisdiction to fit the sentence to the individual, renders any assertion of the privilege fruitless. The duration of the sentence is impacted only by forfeiture of the right against self-incrimination; not invocation of it.

The Fifth Amendment privilege was originally created and refined as an answer to abuses in the prosecution of heresy and treason. *See Berger, Taking The Fifth*, 1-23 (1980). The privilege is one of the great landmarks of civilized man. *Murphy v. Waterfront Comm'n.*, 378 US 52 (1964). This Court is the last resort for many who pray it will survive Florida's current war on drug trafficking.

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[15]According to Florida's trafficking statute, there are two separate sentencing procedures. Once convicted, the accused is automatically given the mandatory minimum. Only after the initial sentence may a mitigation hearing be scheduled, provided that the Appellant wishes to render substantial assistance and the prosecution decides, in its sole discretion, that assistance provided is "substantial". As a consequence, the defendant has no forum in which to assert his Fifth Amendment privilege. It is only after he has succumbed to the pressure, and forfeited his Fifth Amendment right, that he is brought back to the courtroom.

[16]Once convicted, the defendant is automatically denied bail pending appeal. Section 903.133, Florida Statutes (1980).

Due Process of Law

The drafters of Florida's trafficking statute deliberately side-stepped other constitutional safeguards, as well.

Another example -- Due Process. Both procedural and substantive.

Trafficking defendants stand public trial, where their fate swings between a verdict of guilty or acquittal. But the stakes are as high during the statute's clandestine sentencing process, where the defendant faces either mandatory incarceration for many years, without parole, or something as slight as a suspended sentence. The critical issue at this sentencing hearing is whether the defendant has rendered "substantial assistance." The answer to that is routinely reached *in camera,* with the prosecutor holding court, the defendant and his counsel forbidden by the statute to speak, the judge not permitted to interfere. Sentencing under the trafficking statute proceeds unhampered by the adversary system. As Representative Haben succinctly explained, "If you can't trust your State Attorney, who can you trust?" (a 253).

The backroom sentencing process sanctioned by the trafficking statute deprives the defendant of any assurance that the proceedings will be conducted fairly, without "perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Commonwealth of Virginia,* 448 US 555, 569 (1980). As such, the process fails to satisfy even the appearance of justice. *Id.* at 572.

The Florida supreme court recently upheld the constitutionality of the statute's star chamber proceedings, concluding that to open the sentencing hearing would endanger the defendant's life if he submitted to the State's demands to become an informant. *State v. Newman*, Vol. 6, No. 43 Fla.L.W. 620, 621 (Nov. 5, 1981). But when the question is whether to sacrifice even the appearance of justice by *routinely* closing such hearings, or to subject the defendant to risk of grave bodily harm, justice is denied if either interest is deemed to outweigh the other. The question itself is untenable. And the statute which raised that question must be struck down by a higher

law--the Fourteenth Amendment of the United States Constitution.

The operation of this unique sentencing process required some explanation to Florida's legislators when the trafficking bill was on the floor. Mr. Jim White, assistant general counsel to the Governor and a drafter of the statute, provided it: "First of all, the State Attorney, who is, of course, the elected representative of the law enforcement community,[17] has to make a decision first that what he is given (i.e., information or other assistance by the defendant) is 'substantial'."

"Then the bill provides that the arresting agency can come in to be heard in aggravation or mitigation, and they can tell the court, 'No, this isn't substantial, we don't think it is', and explain their reasons." (a254). At no time during any stage of the sentencing process is the defendant permitted an opportunity to be heard.

Nor is he given notice of what constitutes "substantial assistance" until he has rendered it; his venture into the perils of self-incrimination a *fait accompli*. Then, and only then, does the State Attorney make his *ad hoc* decision defining the standardless quagmire termed "substantial assistance".[18]

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[17]*Contra*, Art. V, Section 17, *Florida Constitution*, which provides that the state attorney is the elected representative of the people of his judicial circuit and that he serves as the "prosecuting officer of the courts" therein. His duty is the fair administration of *justice*, not fulfillment of the partisan interests of law enforcement.

[18]893.135(3), Florida Statutes (1979). Subsection (3) provides, in pertinent part, "The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest or conviction of any of his accomplices, accessories, co-conspirators or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion...The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance."

Unless an argument between the arresting agency and its "elected representative", the state attorney, ensues, the judge must simply trust the decision of the state attorney. This, in effect, delegates to the state attorney the "ultimate sentencing function." Dade County Circuit Judge Jon I. Gordon declared. It purports to attempt to determine who may petition the court and under what circumstances. (a84).

Sentencing is a critical stage of the criminal proceeding, and requires the right to counsel along with other procedural safeguards guaranteed by the Fourteenth Amendment. *Mempa v. Rhay*, 389 US 128 (1957); *Specht v. Patterson*, 386 US 504 (1967). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence, even if he may have no right to object to a particular result of the sentencing process. *Gardner v. Florida*, 430 US 349, 358 (1977).

Both the obvious right of convicted drug traffickers to procedural due process at sentencing, and the obvious lack of due process on the face of section 893.135, Florida Statutes, may explain why the Florida supreme court attempted to describe subsection (3) as involving anything but sentencing. The court first declared subsection (3) to be a "*post-conviction* form of plea bargaining". *Benitez, supra* at 518 (emphasis original). Alternatively, the court described it as "a gratuitous sentence reduction offered to one already incarcerated". *Id.* at 520. Simultaneously, the court relied upon the defendant's ability to "invoke" and "elect" the benefits of sentence reduction or suspension, in order to uphold the constitutionality of the statute.[19] *Id.* at 519-20.

Such confusion can be alleviated, by adopting the language which legislators used to describe the sentencing scheme. They called it a "rubber hose", a "weapon" to force convicted people to slave for the State in its somewhat unpopular war against drug trafficking.

Indeed, when section 893.135, Florida Statutes, is viewed as the legislature intended, it becomes clear that the procedure was expertly crafted to meet that objective: First, because judges most commonly are NOT perceived

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[19]Representative Martinez, among others, thought that the statute was designed to render the defendant powerless--and helpless. "Now if I get convicted, I can't go in and I can't initiate a condition," he said, hypothetically, "and if the judge doesn't buy it, and if the officer doesn't like it, you're going to jail with the same guys you helped convict." (a-241).

as the "elected representatives of the law enforcement community", the severe mandatory minimum sentences of subsection (1) are imposed. And subsection (2) commands the judge not to interfere with the use of this new weapon for compelling "substantial assistance".[20]

Second, the prosecutor is given plenary power under subsection (3) to determine what constitutes "substantial assistance", and whether to grant the trial court *jurisdiction* to conduct an *ex parte* sentencing hearing.

Third, having disposed of the threat of judicial intervention and objections by the convicted individual, the legislature provided for the prosecutor's motion to be both filed and heard in chambers to escape public scrutiny of its sentencing scheme.[21]

The procedure established by the statute is devoid of "the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power". *Bordenkircher v. Hayes*, 434 US 357, 362 (1978). As Senator Steinberg explained: "This is something that does not exist today in the law. Today when you find someone guilty and you sentence them to jail, after the first sixty days you no longer can make a deal with them to let them out to get them to turn state's evidence or to do anything." (a-281).

Neither can the statute's due process deficiencies be excused by calling it a "gratuitous sentence reduction". The "substantial assistance" provision is not a substitute

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[20] Section 893.135 (2), Florida Statutes (1979), provides in relevant part, that "adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section."

[21] Circuit Judge Wilkie D. Ferguson suggested the "in chambers" procedure violated the First Amendment of the United States Constitution: "Any rule or law or practice or procedure which excludes the public and the press from any part of the sentencing phase of a criminal procedure is unwarranted. Further, in application, it would tend to undermine the integrity of the entire judicial process. The public has a vested interest in the dispositon of persons convicted of violating its laws." (a-74). *See Richmond Newspapers, Inc. v. Virginia*, 448 US 555 (1980).

for parole. See *Morrissey v. Brewer*, 408 US 471, 477-80 (1972). The only similarity the trafficking statute's "escape valve"[22] shares with the parole release process, see *Greenholtz v. Inmates*, 442 US 1 (1979), is the end result of release from incarceration. The issue of "substantial assistance" depends upon a primarily factual determination.[23] In deciding whether the defendant can render "substantial assistance", the prosecutor performs an inherently adjudicative function which determines the statutory right of the individual to mitigation of sentence. The prosecutor's decision "bear(s) little resemblance to episodic acts of mercy by a forgiving sovereign". *Morrissey, supra* at 493 n.3 (Douglas J., dissenting in part). Rather, the statute places the convicted individual at the mercy of those who have accused and successfully prosecuted him.

Because the statute controls a critical stage of the criminal proceedings--sentencing--the protection afforded by the Due Process Clause must attach. Because the prosecutor performs the *function* of a judicial officer, notwithstanding the procedural due process void of the statute, the sentencing scheme violates the principle of fundamental fairness embodied in the Fourteenth Amendment. See *Marshall v. Jerrico, Inc.*, 446 US 238 (1980).

The due process questions raised by this appeal concern the clandestine practice of Florida's unique, post-sentence "plea bargaining" process and have not previously been considered by this Court. The questions raised are substantial ones because the statute mandates procedure which violates "(t)he requirement of neutrality (which) has been jealously guarded by the Court." *Jer-*

[22] "Subsection (3) provides an 'escape valve' from the statute's rigors." *Benitez, supra* at 517.

[23] Mr. Robin Gibson, general counsel to the Governor, explained to the House Committee on Criminal Justice that "if we had a particular case before us, *if we knew what the facts in that case were*, we could collectively decide what the best thing to do was. But we don't have *the facts of a particular case* before us. We have to give the authority to the State Attorney." (a-246).

rico, supra at 242 (Marshall, J., speaking for a unanimous court). The statute, on its face, obliterates "both the appearance and reality of fairness". *Id.*

Equal Protection Under the Law

The equal protection guarantee, in the Constitution of the United States, warrants that all individuals are to be accorded fair treatment in the exercise of fundamental rights. This necessitates the elimination of distinctions based on impermissible criteria. When laws touch upon fundamental constitutional values, the express policy of this Court is to follow a "strict form of review" to ensure survival of guarantees that are an integral part of the American system of justice.[24]

Among the *fundamental rights*, deserving of "strict scrutiny", are the Fifth Amendment's guarantee against self-incrimination,[25] Sixth Amendment rights in the criminal process,[26] and the Eighth Amendment's ban on cruel and unusual punishment.[27]

Pursuant to the "strict scrutiny" standard, courts are obliged to conduct an independent determination of the degree of relationship which discrimination bears to a constitutionally compelling end, rather than merely defer to the decision of another branch of government that created the classification. The inquiry is two-fold: First, the government must show a proper purpose--a "compelling" or "overriding" end; and, second, that the discrimination is "necessary" to promote that compelling interest.

The Florida supreme court in *Benitez, supra*, failed to do this. Notwithstanding the trafficking statute's intentional inroads on several constitutional guarantees em-

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[24] *United States v. Carolene Products Co.*, 304 US 144, 152 n.4 (1938); *Skinner v. Oklahoma*, 316 US 535 (1942).

[25] *Malloy v. Hogan*, 378 US 1 (1964); and *Griffin v. California*, 380 US 609 (1965).

[26] *Gideon v. Wainwright*, 372 US 335 (1963) (counsel); *In re Oliver*, 333 US 257 (1948) (public trial).

[27] *Louisiana ex rel. Francis v. Resweber*, 392 US 459 (1947); *Robinson v. California*, 370 US 660 (1962).

bodied in the Bill of Rights--not the least of which is the Fifth Amendment privilege against self-incrimination --the *Benitez* court applied the more lenient "rational relationship" test. *Id.* at 519.

Ignoring, for the moment, that the wrong test was followed, a cursory analysis quickly shows that the statute should not survive *any* equal protection challenge, regardless of the standard to be applied. The initial inquiry examines the statute's "purpose", which, according to its creators, is undeniably deliberately designed to force criminal defendants to "talk" despite Fifth Amendment guarantees.[28] Under the "rational relationship" test, this is surely not a "valid" state interest.

The most glaring defect, in equal protection terms, is the trafficking statute's discriminatory impact on those who are simply *unable* to provide "substantial assistance".[29] Basic to proper analysis is the axiom that "people of different circumstances should not be treated as if they

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[28]Senator Spicola, the sponsor of the bill defined its purpose: "The reason for the bill is to make the penalty stiff enough ...it's going to make it worth (the defendant's) while to (talk) ..." (a-292).

[29]This is certainly not the only impermissible classification resulting in discriminatory treatment of a constitutional magnitude. Consider the following: (1) Defendants charged under the trafficking statute are faced with inflated penalties designed to extract incriminatory evidence with no immunization from prosecution; whereas others charged with drug violations are not pressured similarly. (2) Defendants charged with trafficking who, regardless of motive, "spill the beans", are eligible for sentence mitigation even though strong evidence suggests they have not chosen the road to rehabilitation; whereas others who would otherwise qualify for probation suffer the full inflated term of imprisonment when they refuse to yield their constitutional rights. (3) Trafficking defendants are stripped of any opportunity to rebut the presumption of incorrigibility arising from their silence; whereas others convicted of violent crimes, even capital crimes, are not. (4) Persons convicted of trafficking who acquiesce to the coercion to inform must look to the mercy of the prosecutor for access to mitigation; whereas others enjoy a neutral, detached judicial officer. (5) The onesided sentencing features deprive those accused with trafficking of the most basic procedural safeguards, including right to counsel at mitigation, whereas others, including capital convicts, bear no such hardship.

were the same,"[30] particularly when liberty is at stake.

Florida's trafficking provision is "over-inclusive". It treats, in a similar manner, not only those persons whose characteristics similarly relate to the purpose of the law, albeit an improper purpose, but also some additional persons who do not share the distinguishing characteristics. Translated, this means defendants without the *ability* to render "substantial assistance" face the same inflated punishment as defendants with the ability to "talk". "Consider: a lowly member of a drug selling enterprise, with no knowledge of the workings of that enterprise and whose sole function is to consumate sales of drugs on the street level, if charged without accomplice or co-defendant, would not *be able* to provide substantial assistance even if he desired to do so ... Conversely, the ring leader of such an enterprise, intimately familiar with all the members and workings of that enterprise, would be in a position to offer substantial assistance, and would thus be eligible for a lesser sentence."[31]

The net result? Absurd. The least culpable, ordinarily candidates for probation, receive an impenetrable mandatory jail term; while the most culpable get lighter treatment or early release.[32]

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[30] Tussman and tenBroek, "The Equal Protection of the Laws", 37 *Calif. L. Rev.* 341 (1941).

[31] Order of the Honorable Richard S. Hickey, Circuit Court in and for Dade County, Florida. (a-90).

[32] The Leopolds and Loebs are given leniency, and not made to suffer the whole term of the mandatory minimum.

Florida's trafficking statute is pregnant with discrimination. Discrimination is simply not compatible with the idea of equal protection of the laws. This is also implicit in the ban on "cruel and unusual punishment".

Those who wrote the Eighth Amendment knew what price their forebearers had paid for a system based, not on equal justice, but on discrimination. In those days the target was not "amateurs" as prospects for police informants, but the dissenters who opposed government's recurring efforts to foist a particular religion on the people. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishment" contained in the Eighth Amendment.

As a practical matter, an "irrebuttable presumption" of *ability* to render substantial assistance is created by the challenged law.[33] Under the bifurcated sentencing procedure, the defendant simply cannot contradict the presumption since his *inability* is used to deny him access to the court to explain his failure to furnish information.

This paradox raises a serious question left unanswered by the *Roberts* case. That is, whether a state can automatically inflict exaggerated penalties upon a defendant whom it presumes has the ability to render "substantial assistance" for mitigation, when the defendant has *no ability* to deflate the enhanced punishment, by providing information, as well as *no opportunity* to explain his inability.[34]

CRUEL AND UNUSUAL PUNISHMENT

Florida's governor and legislators hailed the trafficking statute's mandatory prison terms and fines as the harshest in the nation. (a 297-99). Backing this claim to Draconian fame--palled, perhaps only by Florida's remarkably long Death Row--was the statute's widely-acknowledged propensity to precipitate murder.

"If he doesn't strike a bargain before he's convicted, he's going to be dead. And we all know that." (a 251). Representative Martinez's foregoing comment upon the fate which confronts people charged with violating the trafficking statute is indicative of opinions voiced by the

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[33] The State, in its brief to the *Benitez* court, conceded that the harsh penalties of the statute "presume" that substantial assistance can be given. *See* brief of *Benitez* Appellant at 22.

[34] Even "misprison of felony", cited in *Roberts, supra*, as historical precedence for the "duty" to report criminal behavior, places the burden on the state to show that the accused has "*knowledge*" of the crime. *Id.* at 629, n.5.

Recall that petitioner Roberts did *not* contend that he was "unable to provide the requested assistance. Of course, he was afforded the opportunity to explain, whereas defendants under Florida's experimental law are not.

bill's drafters and the Florida supreme court.[35] No one doubts that once publicly identified upon arrest, trafficking defendants are marked as potential informants against the financiers of Florida's multi-billion-dollar drug trade. Death, the surest silence, becomes an attendant risk. Those who have spoken of this risk only disagree over the stage of the proceedings at which murder of defendants becomes most probable.

While Rep. Martinez concluded the danger is greatest during the pre-trial stage, one drafter of the statute opined that the likelihood of murder increased post-conviction, as the passage of each mandatory year in prison increased the defendant's desire to utilize the "substantial assistance" escape-valve. Homicide, he said, would be the method preferred by drug-smuggling financiers to "encourage" defendants to silently serve out their time.[36] On the other hand, the Florida supreme court recently stated that those defendants who *do* render "substantial assistance" to law enforcement to escape the statute's mandatory prison terms would likewise be "endangering their lives." Trafficking defendants are caught between the hope of escaping the statute's stiff penalities through conscription into highly-dangerous government service, and the ever-present anxiety of death at the hands of drug financiers. They can only pray for the opportunity to

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[35]See *State v. Newman, Vol. 6, No. 43* Fla. L.W. 620 (Supreme Court of Florida, Nov. 5, 1981). The issue before the court in *Newman* involved the constitutionality of *in camera* sentencing proceedings for those trafficking defendants who render "substantial assistance." The court upheld the procedure as constitutional, stating: "While the presumption in favor of openness is powerful, there are circumstances where closure is justified . . . . Recognizing that the statute with which we are concerned is utilized to combat drug trafficking, and that many persons who aid the authorities in the manner described above (i.e., in accordance with the trafficking statute's "substantial assistance" requirements) *would be endangering their lives,* we are confident that closure would be justified in a number of the proceedings arising under said law." *Id.* at 621. (Emphasis supplied).

[36]Statement of Jim White, assistant general counsel to the Governor, before the House committee reviewing the trafficking bill. (a 256).

inform against themselves: to plead guilty to a lesser offense.[37]

Notwithstanding this *de facto* capital punishment aspect of the trafficking statute, its *de jure* sentencing scheme strikes at the heart of the Eighth Amendment--the "principle of civilized treatment"[38] heretofore guaranteed to all persons convicted of any crime. The statute codifies the Florida legislature's vow of vengeance against drug traffickers: to punish severely those most easily apprehended. And hope that through the submission such punishment brings, to apprehend those most culpable. Vengeance is distinguishable from civilized forms of justice in that it retaliates with severity often surpassing the original sin that invited retribution. Revenge, simply stated, is oblivious to the culpability of the individual.

The Cruel and Unusual Punishment Clause is violated when the punishment inflicted is grossly disproportionate to the severity of the crime. *See Coker v. Georgia,* 433 US 584 (1977); *Rummel v. Estelle,* 445 US 263, 288-93 (1980) (Powell, J., joined by Brennan, Marshall and Stevens, J.J., dissenting). Disproportionate punishment is inherent in the stated objective of the trafficking statute: to compel defendants to become informants. *See Benitez, supra* at 517. Indeed, the legislative history shows the lawmakers agreed that the mandatory sentences, which precluded the courts from matching the penality to the offender, were too severe for the crime of trafficking.[39] Rather, those

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[37] *State v. Newman, supra,* at 621.

[38] *Trop v. Dulles,* 356 US 86, 99 (1958).

[39] *See, e.g.,* Statement of Rep. Haben (a 237) (statute's penalties are "mandatory" only if defendants refuse to aid law enforcement); Statement of Sen. Myers (a 274-76) (criticizing stiff mandatory penalities "for what is commonly deemed to be a non-violent crime); Statement of Sen. Spicola (a 277-78) (whole thrust of the statute is to make defendant inform against drug financiers). Punishment may be disproportionate if it is excessive in comparison to the gravity of the offense, measured by objective standards. In Florida, only capital felonies (mandatory penalty of 25 years in prison without parole when death sentence not imposed) under section 775.082, Fla. Stat., are punished with equal or greater severity than drug trafficking. Even for a life felony or a first-degree

impenetrable years in prison, without hope of parole, would be the stick used to prod reluctant defendants towards providing "substantial assistance." Freedom would be the carrot dangled from it. And inability, due to lack of knowledge, would be no excuse.

Even if the State could make failure to render "substantial assistance" to law enforcement a crime, the infliction of this statute's mandatory sentences and fines is cruel and excessive punishment for the conduct of standing silent before the State's demands.[40] This proposition gains force by the fact that the statute has proven virtually ineffective in curbing Florida's drug trade, throughout the years it has been enforced. The premise upon which the statute's admittedly severe penalties were based--that defendants must be made informants for the State to capture the financiers--has been proven false by the statute's history, recently admitted by Governor Graham.[41] When the rationale for the statute's punishment is lost, only the human suffering remains. Furthermore, no real distinction can be drawn between the use of excessive punishment to compel a defendant to inform against

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felony, other than drug trafficking, the defendant remains eligible for probation or parole. *But see* section 775.087 (2), Fla. Stat. (three-year mandatory prison term for certain offenses committed with a firearm).

[40] "Section 893.135 essentially enacts a new offense of failing to inform against fellow citizens and other persons, ... contrary to basic precepts of a free society." Order of Dade County Circuit Judge John A. Tanksley. (a 98). *Compare Roberts v. United States, 445* US *552* (1980). In *Greenholtz v. Inmates,* 442 US 1 (1979), this Court reiterated the rule that "given a valid conviction the criminal defendant has been constitutionally deprived of his liberty." *Id.* at 7. But that "liberty" which a valid conviction extinguishes does not encompass all aspects of individual autonomy. *See, e.g., Pell v. Procunier,* 417 US 817 (1974); *Cruz v. Beto,* 405 US 319 (1972). Underlying these rights is the right to human dignity preserved by the Eighth Amendment. *E.g., Hutto v. Finney,* 437 US 678, 685 (1978); *see also* Shapiro, "Legislating The Control of Behavior Control: Autonomy and The Coercive Use of Organic Therapies," 47 *S. CAL L. R.* 237 (1974) (constitution limits state's power to legislatively control human behavior, even when stated objective is rehabilitation of criminal offenders).

[41] *See* "Graham Attacks Lack of Aid in Drug Fight," The Gainesville Sun (a322).

others, and to compel him to inform only against himself by pleading guilty to a lesser offense.

In determining whether a punishment comports with human dignity protected by the Eighth Amendment, the Court is guided by another principle inherent in the Clause--that the State must not *arbitrarily* inflict punishment.[42] This principle derives from a concept of fundamental fairness which is violated when the State, without sound reason, inflicts upon some people a punishment that it does not inflict upon others.

The mandatory penalties of the trafficking statute--being designed to compel "substantial assistance" to law enforcement as an informant, rather than to punish the offense of trafficking--violate this principle on at least three grounds. First, the legislature was after the financiers of the drug industry--not the people tending the fields or caught carrying the goods. But the mandatory penalties strike these "mules" and miss the professed target--the money men.[43]

Second, the punishment is arbitrarily inflicted because the trafficking statute takes constitutional rights that it cannot pry loose from some defendants and throws them both into prison. There is no sound reason for imprisoning persons who exercise the rights of the United States Constitution while freeing persons convicted of the same offense who relinquish them.

Human dignity, guaranteed by the Eighth Amendment, *a priori* demands fair treatment of each individual. Fairness is measured by the treatment of the individual compared to all others similarly situated. Because the trafficking statute, on its face, intentionally denies leniency upon the basis of the prosecutor's arbitrary and unreviewable decision of what constitutes "substantial assistance," the statute--in yet a third

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[42]*See, e.g., Coker v. Georgia,* 433 US 584, 596-97 (1977) (punishment rarely imposed may be arbitrarily imposed, contra to the Eighth Amendment).

[43]"Mules" is the term frequently used by Florida legislators during hearings on the trafficking bill to refer to the lowly truck driver, fishing-boat captain and other hired-hands who handle drugs, as contrasted with the king-pins of the drug trade who handle only the money. *See, e.g.,* (a 240, 248, 278).

respect--violates the prohibition against arbitrary infliction of punishment.[44]

The Florida supreme court in its *Benitez* decision found that the statute met the requirements of the Eighth Amendment because the mandatory sentences of subsection (1) applied to all persons convicted of trafficking. 395 So.2d at 517-18.

But the power of the State legislature to enact mandatory sentences is not the issue here. The constitutionally-repugnant operation of this statute is performed by the inseverable conjunction of subsections (1), (2) and (3). Only subsections (1), (2) and (3), acting together, penalize those who refuse to render "substantial assistance" based upon a valid Fifth Amendment claim against self-incrimination. Only subsections (1), (2) and (3), acting in concert, penalize those who are truly unable to meet the prosecutor's definition of "substantial assistance," a "status" over which they have no control. *See Robinson v. California,* 370 U.S. 660 (1962).

By upholding the statute against an onslaught of constitutional challenges, the Florida supreme court effectively decreed that persons charged with drug trafficking have lost the right to have rights.[45] At best, defendants have only the illusory "right" to surrender

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[44] In addition, federal authorities have rejected the recommendation that mandatory minimum sentences be utilized against drug traffickers. *Report of the Comptroller General of the United States,* "Bailing and Sentencing Practices Further Weaken Immobilization Efforts," submitted to Congress on 25 October 1979 (reprinted in *Contemporary Drug Problems* 325, 329 (Fall 1979).

[45] *See Trop v. Dulles, supra* at 102. Given the inherently dangerous condition of serving as a narcotics informant, *see, e.g.,* Misner & Clough, "Arrestees as Informants: A Thirteenth Amendment Analysis," 29 *Stanford L. Rev.* 713 (1977), and the fact that Florida's trafficking statute lacks standards as to what constitutes "substantial assistance," or what benefits, if any, will accrue to defendants who attempt this route to freedom, the alternative punishment of rendering "substantial assistance" displays the same characteristics which the *Trop* Court condemned: "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, and when or for what cause his existence. . .may be terminated." 356 US at 102.

rights guaranteed by the United States Constitution--an illusion sustained by the trafficking statute, with its mirage of sentence reductions materializing from inflated, mandatory penalties.

The trafficking statute's sentencing scheme--admittedly unusual--also is cruel. It breeds mental anguish. Florida's prisons have achieved notoriety as among the most brutal penal warehouses in the nation. Murder, mayhem, and psychological mutilation by homosexual rape, coupled with crisis-level overcrowding, represent the reported conditions of incarceration in the State.[46] Constitutional rights afford no protection to dead men. Nor do they furnish much comfort to those stripped of their safeguards and confined behind bars. That is the resounding message of both the legislative history and the inflated penalties of Florida's trafficking statute.

Although *Rummel v. Estelle, supra,* has raised considerable doubts as to whether the Eighth Amendment's prohibition against cruel and unusual punishment would invalidate a State's enactment of any sentencing scheme not explicitly drawn to execute defendants,[47] the scope of the Amendment remains to be explored. The question presented has not been previously considered by this Court, and justice requires its determination.

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[46] *See e.g.,* Orders of state courts declaring prison conditions unconstitutional. (a 318). Prison brutality is part of the total punishment to which the individual is subjected for his crime, and thus is a proper subject for Eighth Amendment scrutiny. *Ingraham v. Wright,* 430 US 651, 669 (1977); *Hutto v. Finney,* 437 US 678, 685 (1978); *see also Brooks v. Florida,* 389 US 413 (1967), wherein the Court described the conditions of Brooks' incarceration as a "shocking display of barbarism," and held Brooks' confession under such conditions to be involuntary.

[47] It must be noted that, unlike the Texas statute at issue in *Rummel,* Florida's trafficking statute expressly denies parole throughout the duration of the mandatory sentence automatically imposed, unless the prosecutor determines that the defendant has rendered "substantial assistance." And unlike the Texas statute which was designed to punish the habitual criminal who "has been both geographically informed of the consequences of lawlessness and given an opportunity to reform, all at no avail," *Rummel, supra* at 278, the trafficking statute's mandatory penalties were designed to punish only those who failed to provide "substantial assistance," and given no opportunity to explain the reasons for their failure.

CONCLUSION

Law enforcement for centuries has managed ways to draft informants. Now Florida's experimental trafficking statute deploys the courts in this clandestine trade. The danger cannot be overstated: Courts, as participants in a statutory scheme designed to compel sacrifice of constitutional rights, cannot also safeguard those rights.

The paramount importance of an independent judiciary to our criminal justice system--a principle which formed the cornerstone of this Court's decision in *Roberts*--is emasculated by Florida's trafficking statute. And ignored by the *Benitez* court, which seized upon dicta from *Roberts* to sustain an insidious sentencing process that sanctions the use of inflated penalties as traps, with hollow rewards as bait. No amount of camouflage can effectively disguise the legislature's admitted plan: The defendant, who reluctantly gives "substantial assistance," will likely receive the same punishment for his crime he would have originally incurred had the penalty not been initially inflated and automatically imposed.

The sleight of hand is obvious.

The defendant reaps counterfeit benefits; created to be given away. The price he pays, however, is genuinely high: Constitutional rights.

The deflation of sentence exchanged for conscription as a government informant constitutes a hollow reward -- and one which robs society of any assurance of the defendant's rehabilitation. And this is presuming that mitigation will occur. There are no guarantees. The whole deal transpires behind closed doors--a setting pregnant with partiality and, perhaps, perjury.

Those defendants who refuse to give up fundamental rights are forced to serve an inflated prison term instead. They are punished severely; for a crime never prosecuted in a court of law: the crime of standing silent to the State's demands for assistance. There is no appeal; in fact, the courts are forbidden to interfere.

Then there are those who are simply unable to furnish "substantial assistance." They face the excess years the legislature intended to trade for information. The lawmakers presumed they could furnish it. The

lawmakers were wrong; yet the defendants suffer from the mistake. Extra years not imposed for the crime charged. Extra years imposed based on an assumption that ran afoul.

This APPEAL challenges the constitutionality of a statute which authorizes the prosecutor to hold court; and demotes the judge to participant, virtually powerless to stop injustice. The unequivocal purpose of the trafficking statute--to compel criminal defendants to serve as informants--has been sustained by Florida's highest court.

For the foregoing reasons, and those urged in the body of this Brief, this Court should note probable jurisdiction and set this case for full briefing and argument.

Respectfully submitted,

LARRY G. TURNER
Counsel of Record
THOMAS W. KURRUS
Law Office of Larry G. Turner, P.A.
204 West University Avenue
Post Office Box 508
Gainesville, FL 32602
(904) 375-4460

MICHAEL L. BRYANT
JACK M. ROSS
Law Office of Birr, Bryant & Saier, P.A.
204 West University Avenue
Post Office Drawer 1168
Gainesville, FL 32602
(904) 375-1000

Attorneys for Appellants

November 19, 1981.

TW

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

CASE NOS.: XX-449 & YY-31

RONALD C. LOCKE and LESLIE L. FLAGE,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

Opinion filed May 22, 1981.

An Appeal from the Circuit Court for Dixie County.
L. Arthur Lawrence, Judge.

Larry G. Turner and Thomas W. Kurrus, Gainesville, for Appellant/Locke. Michael L. Bryant and Jack M. Ross, Gainesville, for Appellant/Flage.

Jim Smith, Attorney General; Gregory C. Smith, Assistant Attorney General; and Todd Foster, Legal Intern, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, J., LILES, WOODIE A (Retired), and OWEN, WILLIAM C., Jr. (Retired), Associate Judges, CONCUR.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

CASE NO.: XX-449
YY-31

RONALD C. LOCKE, and
LESLIE L. FLAGE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

COMES NOW, the Appellant, RONALD C. LOCKE, by and through his undersigned counsel and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and moves this Court to REHEAR the above-styled appeal and, in support, shows unto the Court that:

1. This honorable Court has overlooked or failed to consider the interplay between the "four-corners doctrine", enunciated by this Court in *Swartz v. State*, 316 So. 2d 618 (Fla. 1st DCA 1975), and Section 933.18, Florida Statutes. According to *Swartz*, probable cause must appear "*on the face*" of, and WITHIN THE FOUR CORNERS" of the affidavit pursuant to Florida Constitutional mandate requiring probable cause to be supported by "*affidavit*"; as distinguished from merely an oath or affirmation. Article I, Section 12, Florida Constitution. Section 933.18, Florida Statutes, prohibits the search of a private dwelling unless affiant sets forth "*specific facts*" establishing probable cause that the evidence sought would be found "*inside*" that home. Simply put, the affidavit must contain *both* a "*statement of belief*", by the affiant that the items to be seized are "inside" the dwelling, and "*specific facts*" upon which that belief is justifiably predicated. The instant affidavit

contains neither. Appellant's private home was searched, with a fine tooth comb, by a team of officers, under the auspices of a warrant arising from an affidavit containing no *allegation that marijuana was "inside"* the home, or for that matter, "inside" any other building near that home. In addition, the affidavit is devoid of "specific facts" supporting the missing assertion that the items to be seized were "inside" the house. Speculation will not do. Reading between the lines is constitutionally prohibited. The language and meaning of the pertinent authority, Article I, Section 12, Florida Constitution and Section 933.18, Florida Statutes, is unmistakably clear. The affidavit is plainly insufficient and as a consequence, the search of the dwelling, resulting in the seizure of evidence connecting Appellant to the crime, must be invalidated.

2. This honorable Court has overlooked or failed to consider the "particularity" requirement of the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Consitution, as construed in the recent Florida decision, *Pezella v. State*, 390 So. 2d 97 (Fla. 3d DCA 1980). That Court, citing the United States Supreme Court in *Marron v. United States*, 275 U.S. 192 (1927), invalidated a search pursuant to a warrant in which the command portion was unconstitutionally overbroad. The command failed to adequately limit the officers' discretion on the "items to be seized". Similarly, the command in the instant warrant failed to limit the officers and, in fact, empowered them to search for *anything* of evidentiary value. There is no qualifying language in the command; no restriction as to what may be searched for and seized. As a result, the ensuing search and analysis of every item of Appellant's personal property on the premises, under the general warrant at bar, cannot be permitted to stand.

3. This honorable Court overlooked the only justification offered by the State for seizures outside the scope of the instant search warrant, and, in addition, failed to consider the pertinent case law, *Mincey v. Arizona*, 437 U.S. 385, 395 (1978), wherein the Supreme Court rejected that same justification offered by the State of Arizona. The burden of establishing the legality

of seizures not authorized by a warrant rests with the State: *Bicking v. State*, 293 So.2d 395 (Fla. 1st DCA 1974). The State, in an attempt to justify the hundreds of seizures outside the scope of the instant warrant propounded a so-called exception to the warrant requirement - - a "crime scene exception" - - allowing them to "process" the area suspected of criminal activity. [See L.R. 260]. The United States Supreme Court, in *Mincey*, supra, expressly rejected this argument and reiterated that warrantless seizures must be supported by traditional exceptions to the warrant requirement. The State, in the case *sub judice*, offered none. Thus, the search, and seizure of the only evidence linking the Appellant to the crime, must fail.

4. Appellant, LOCKE, also adopts and incorporates herein all grounds contained in Appellant FLAGE'S MOTION FOR REHEARING filed with this Court on Monday, 8 June 1981.

WHEREFORE, Appellant, RONALD C. LOCKE, moves this Court for a REHEARING in the above-styled cause, or, in the alternative, requests that this Court enter its Order reversing the Order of the Trial Court denying the Defendant's MOTION TO SUPPRESS EVIDENCE.

Respectfully submitted,
LAW OFFICES OF LARRY G. TURNER, PA

/S/Tom Kurrus
LARRY G. TURNER
THOMAS W. KURRUS
204 West University Avenue, Suite 6
Post Office Box 508
Gainesville, Florida 32602
(904) 375-4460

I HEREBY CERTIFY copy hereof has been furnished by mail to Michael L. Bryant, Post Office Box 1168, Gainesville, Florida, 32602, and the Attorney General, The Capitol, Tallahassee, Florida 32301, this 5th day of June, 1981.

/S/ Thomas Kurrus
THOMAS W. KURRUS

IN THE DISTRICT COURT OF
APPEAL FIRST DISTRICT

CASE NO: XX-449
YY-31

RONALD C. LOCKE, and
LESLIE L. FLAGE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

COMES NOW, Appellant, LESLIE L. FLAGE, by and through his undersigned attorney, pursuant to Rule 9.330 *Fla. R. App. P.*, and moves this Court for Rehearing and as grounds therefor states:

1. Appellant believes the Court misapprehended or overlooked the prejudice that Appellants suffered by the refusal of the trial Court to suppress evidence other than marijuana which was seized outside the scope of the warrant. This prejudice stems from the fact that this illegally seized evidence constituted the only link the State could produce between Appellants and the premises.

2. Appellant believes the Court misapprehended or overlooked the prejudice suffered by Appellants by the refusal of the trial Court to dismiss Count I. Even though Appellants pled Nolo Contendere to a lesser charge, that plea was entered while Appellants faced the spectre of a mandatory 25 year minimum sentence under Count I. Appellants were forced to forego their Constitutional right to a jury trial in order to avoid a charge for which prosecution would have been unconstitutional due to illegal distruction of evidence.

3. Appellant Flage also adopts and incorporates herein all grounds presented by Appellant RONALD C. LOCKE in his Motion for Rehearing filed in the Appeal.

WHEREFORE, Appellant, LESLIE L. FLAGE, moves this Court for Rehearing and requests that this Court enter its Order reversing the Judgment of the Court below.

Respectfully submitted,

/S/ Jack M. Ross
MICHAEL L. BRYANT, ESQUIRE
JACK M. ROSS, ESQUIRE
BIRR, BRYANT & SAIER, P.A.
Post Office Drawer 1168
Gainesville, Florida 32602
(904) 375-1000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by mail to: ROBERT MOELLER ESQUIRE, Assistant State Attorney, Post Office Box 1147, Cross City, Florida; LARRY TURNER, ESQUIRE, Post Office Box 508, Gainesville, Florida 32602; JIM SMITH, GREGORY C. SMITH, and TODD FOSTER, Office of the Attorney General, The Capitol, 1502, Tallahassee, Florida 32301, this 5th day of June, 1981.

/S/ Jack M. Ross
OF COUNSEL

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Supreme Court Building
Tallahassee, Florida 32304
Telephone No. (904) 488-6152

August 21, 1981
CASE NO. XX-449, YY-31

LESLIE FLAGE and RONALD C. LOCKE

VS.

STATE OF FLORIDA

Appellant/Petitioner. Appellee/Respondent.

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above styled case on the above date:

Motions for Rehearing denied.
Requests for Oral Argument denied.
Motion to Strike Notice of Supplemental Authority denied.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:
Michael L. Bryant of Birr, Bryant & Saier, Gainesville, Fl;
Thomas W. Kurrus, Esq., Gainesville, FL; Gregory C. Smith, Assistant Attorney General, Tallahassee, FL.

/S/ Catherine Raven
Deputy Clerk

STATE of Florida, Appellant,
v.
Carlos M. BENITEZ and Esperanza Benitez,
Appellees.
No. 57834.

Supreme Court of Florida.

Feb. 12, 1981.

Rehearing Denied April 13, 1981.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, and Janet Reno, State Atty., and Arthur Joel Berger, Asst. State Atty., Miami, for appellant.

Joseph Beeler, and Brian Richard McComb, Miami, for appellees.

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, for Daniel Cowgill, amicus curiae.

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979) - Florida's newly-enacted "drug trafficking" statute - is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's ruling.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs.

Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. Standing

The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So. 2d 3, 4, (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v. Millington*, 377 So.2d 685 (Fla.1979); *State v. Champe*, 373 So.2d 874 (Fla.1978).

2. *Cruel and Unusual Punishment*

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend that the mandatory minimum sentences uncontitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State*, 351 So.2d 972 Fla.1977), and warrants no further discussion here.

1. Art. 1, § 17, Fla.Const.
2. U.S.Const. amend. VIII.
3. *Lockett v. Ohio*, U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.3d 974 (1976).

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See, e. g., McArthur v. State,* 351 So.2d 972 (Fla.1077); *Banks v. State,* 342 So.2d 469 (Fla.1976); *ODonnell v.state*, 326 So.2d 4 (Fla.1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case-wherein the sentence was *grossly* disproportionate to the severity of the crime-the legislature's judgement would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle,* 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eight amendment. the majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eight Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime.... In recent years this proposition has appeared most frequently in opinions dealing with the death penalty.... Because a sentence of death differs in kind form any sentence of imprisonment, not matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to

Rummel.

> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S.Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by and decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S.Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State*; *O'Donnell v. State*; *accord, People v. Broadie,* 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *cert. denied,* 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1075).

3 *Due Process-Vagueness*

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person ... who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather that a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State,* 359 So.2d 450 (Fla.1978) (statutory definition of proscribed activity held

unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whold statute. *Schultz v. State,* 361 So.2d 416 (Fla.1978). There is no due process infirmity.

4. *Equal Protection*

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State,* 366 So.2d 8 (Fla.1978).

5. *Separation of Powers*

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, § 3, Fla.Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, § 2(a), Fla.Const., in that it conflicts with Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constituttion.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence...." Subsection (3) states that "[t]he arresting agency shall be given and opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the

statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defnedants, to the extent they do not conflict with the explicit language of subsection (3). No infirimity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." *People v. Eason,* 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353, N.E.2d 587, 589 ')1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. *Self-incrimination*

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authborities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisditions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statue is compulsive. Putting a defendant to a difficult choice is not necessarily

forbidden by the fifth amendment. *See, e.g., Corbitt v. New Jersey,* 439 U.S. 212, 218, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978) ("[N]*ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.*" (footnote omitted)); *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ctg. 663, 54 L.Ed.2d 604 (1978); *zmcGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, *see United States v. Garcia,* 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta,* 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc,* 509 D.1s 539 (5th Cir.), *cert. denied,* 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Rogers,* 504 F.2d 1079 (5th Cir. 1974), *cert. denied,* 422 U.S. 1042, 95 S. Ct. 2655, 45 L. Ed. 2d 693 (1975), we believe that *Roberts v. United States,* 455 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 559, 100 S. Ct. at 1364. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his ccoperation is not tantamount to the enhancement of a sentence imposed on an unsentences, but convicted defendant as a result of his lack of cooperation. The former is not different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J. and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

STATE of Florida, Appellant,
v.
Esteban YU, Appellee.

STATE of Florida, Appellant,
v.
Alejandro TORO, Appellee.

STATE of Florida, Appellant,
v.
Gilbert MEJIA, Appellee.

STATE of Florida, Appellant,
v.
Ubaldo MARULANDA, Appellee.

STATE of Florida, Appellant,
v.
Dennis POLING, Appellee.

STATE of Florida, Appellant,
v.
Dane Michael GRAZIANO, Aldolfo Ferreira,
and Gail Rehman, Appellees.

STATE of Florida, Appellant,
v.
Dania GOMEZ, Placido Bentancourt,
Gustavo Calliero, and Raul Gonzalez, Appellees.

STATE of Florida, Appellant,
v.
Jim WALL, III, William Gregory Wall, and
Danny Russell, Appellees.

STATE of Florida, Appellant,
v.
Howard LEVINSON, Dennis Romanov,
and Mark Adrian Miller, Appellees.

STATE of Florida, Appellant,
v.
Michael Lee HARRIS, Appellee.

Nos. 57961, 58105, 58106, 58108, 58137, 58267, 58364, 58674, 58828 and 58971.

Supreme Court of Florida.

May 8, 1981.

Rehearing Denied July 23, 1981 (58,674).

Jim Smith, Atty. Gen., and Calvin L. Fox and Steward J. Bellus, James S. Purdy, Asst. Attys. Gen., Miami, for appellant.

Denis Dean of Dean & Hartman, Miami, for appellee Yu.

Manuel Vazquez, Coral Gables, for appellee Toro.

William R. Tunkey of Weiner, Robbins, Tunkey & Ross, Miami, for appellees Mejia, Marulanda, and Gomez.

I. Richards Jacobs, Miami, for appellee Poling.

Melvin S. Black, Miami, and Steven Wisotsky, Fort Lauderdale, for appellee Graziano.

Edward J. O'Donnell of Spain & O'Donnell, North Miami, for appellee Ferreira.

Richard A. Bailey and Benedict P. Kuehne of Bierman, Sonnett, Bailey & Showhat, Miami, for appellee Rehman.

Robert G. Kerrigan of Kerrigan, Estess & Rankin, Pensacola, for appellee Wall.

Michael D. Gelety, Fort Lauderdate, for appellee Levinson.

P. D. Aiken of Aiken & Damore, Fort Lauderdale, for appellee Romanov.

Arnold T. Blostein, Fort Lauderdale, for appellee Miller.

Ronald K. Cacciatore, Tampa, for appellee Harris.

ALDERMAN, Judge.

These cases are before us on direct appeal to review orders of the trial courts granting the defendants' motions to dismiss and holding section 893.135, Florida Statutes (1979), unconstitutional. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution (1972).

We resolved all of the constitutional issues presented by these appeals, with the exception of one, in *State v. Benitez,* 395 So. 2d 514 (Fla. 1981), wherein we upheld the validity of section 893.135. We, however, did not address the issue of whether section 893.135(1)(b), prohibiting the sale or possession of "28 grams or more of cocaine or any mixture containing cocaine, as described in s. 893.135(2)(a)," violates the due process and equal protection provisions of the Florida and federal constitutions.

In the appealed orders, the trial courts held that penalizing possession of a certain amount of "any mixture containing cocaine" without regard to the percentage of cocaine in the mixture is arbitrary, unreasonable, and a violation of due process and equal protection of the law. We disagree and uphold section 893.135 against these challenges.

We find convincing the rationale of teh Supreme Court of Illinois in *People v. Mayberry,* 63 Ill. 2d 1, 345 N.E. 2d 97, *cert. denied,* 429 U.S. 828, 97 S. Ct. 87, 50 L. Ed. 2d 92 (1976). Therein, defendants challenged the Illinois cannabis control act and the controlled substances act which classified offenders by providing that an offense becomes more severe as the weight of the substance involved increases. The classifications of this act were not based upon the amount of pure cannibis or controlled substance involved but rather were based upon the amount of the substance containing the cannabis or controlled substance. Upholding this act, the Illinois Supreme Court, relying upon *United States ex. rel. Daneff v. Henderson,* 501 F. 2d 1180 (2d Cir. 1974), said:

The court noted in *Daneff* that dangerous drugs are generally marketed in a diluted or impure state. It was therefore held that it was not unreasonable or irrational for a legislature to deal with the mixture or compound rather that the pure drug. The court went on to state that "[t]he State cannot be expected to make gradation and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a computer." (501 F. 2d 1180, 1184). We find the reasoning of the court in *Daneff* persuasive. Our legislature may have believed that any given amount of drug can be distributed to a greater number of people and thus have a greater potential to be harmful if it is mixed with another substance. While the soundness of that belief may be questionable, the determination is one for the legislature to make, and we cannot find that the classification schemes at issue have no reasonable basis. Also, the defendants have not demonstrated that a classification scheme based upon the amount of the pure drug contained in a given substance would be feasible. We therefore conclude that the classification schemes are not unconstitutional merely because that are based on the amount of the "substance containing" the cannabis or controlled substance rather than the pure cannabis or controlled substance.

345 N.E. 2d at 101.

In *Daneff*, defendant challenged a New York drug law on the basis that there was no rational basis for the statutory scheme which assessed punishment on possession of a quantity of "mixture" without regard to the actual quantity of the dangerous drug present in the mixture. Defendant argued that this sentencing scheme violated equal protection and due process of the law because it created unequal and irrational treatment of offenders guilty of what he contended were identical offenses. Under the New York law, possession of a given amount of pure cocaine and the possession of the same

amount of cocaine mixed with various amounts of diluent were viewed as different offenses, the latter carrying greater sanctions. The United States Court of Appeals, Second Circuit, held that there was a rational basis for the classification drawn by the New York legislature, and therefore the statute in question did not violate either due process or equal protection of the laws. It held that the defendant's argument in support of his claim that the statute was irrational proved too much and too little and explained:

> Too much, in the sense that, by accepting appellant's own premise that narcotics such as heroin and cocaine are generally marketed in mixtures or compounds, it does not seem unreasonable or irrational for a legislature to deal realistically with the marketing of the mixture or compound rather than the handling of the pure narcotic. Too little, in the sense that while it may not be wise to let the possessor of the pure or a purer product escape with a lighter penalty than that going to the possessor of the drug in its ordinary marketable form, it is not necessary for a legislature to attempt to eradicate all evil, but only part of it; as the Court said in *Pennsylvania v. Ashe,* 302 U.S. 51, 55, 58 S. Ct. 59, 60, 82 L. Ed. 43 (1937), "The comparative gravity of criminal offenses and whethere their consequences are more or less injurious are matters for [the state's] determination."

501 F. 2d at 1184. Recognizing that heroin and cocaine at least are generally marketed in a diluted or impure state, the court stated that the legislature's rationale for striking at the mixture or compound was evident.

[1, 2] We agree and find this rationale applicable to section 893.135(1)(b). The legislature has broad discretion in determining necessary measures for the protection of the public health, safety, and welfare, and we may not substitute our judgement for that of the legislature as to the wisdom or policy of a legislative act. *Hamilton v. State,* 366 So. 2d. 8 (Fla. 1978). Section

893.135(1)(b) bears a reasonable relationship to the legitimate state objective of protection of the public health, safety, and welfare. The legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people that the same amount of undiluted cocaine and thus could pose a greater potential for harm to the public. This was within its prerogative to decide, and it has not been shown that such decision was irrational or unreasonable.

Accordingly, the orders of the trial courts are reversed on the authority of *State v. Benitez* and on the basis of our present holding that section 893.135(1)(b) is not arbitrary and unreasonable and does not violate due process and equal protection of the laws.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

CASE NOS.: XX-449 & YY-31

RONALD C. LOCKE and LESLIE L. FLAGE,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

Opinion filed May 22, 1981.

An Appeal from the Circuit Court for Dixie County.
L. Arthur Lawrence, Judge.

Larry G. Turner and Thomas W. Kurrus, Gainesville, for Appellant/Locke. Michael L. Bryant and Jack M. Ross, Gainesville, for Appellant/Flage.

Jim Smith, Attorney General; Gregory C. Smith, Assistant Attorney General; and Todd Foster, Legal Intern, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

ERVIN, J., LILES, WOODIE A (Retired), and OWEN, WILLIAM C., Jr. (Retired), Associate Judges, CONCUR.

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

CASE NO.: XX-449
YY-31

RONALD C. LOCKE, and
LESLIE L. FLAGE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

COMES NOW, the Appellant, RONALD C. LOCKE, by and through his undersigned counsel and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and moves this Court to REHEAR the above-styled appeal and, in support, shows unto the Court that:

1. This honorable Court has overlooked or failed to consider the interplay between the "four-corners doctrine", enunciated by this Court in *Swartz v. State*, 316 So. 2d 618 (Fla. 1st DCA 1975), and Section 933.18, Florida Statutes. According to *Swartz*, probable cause must appear "*on the face*" of, and WITHIN THE FOUR CORNERS" of the affidavit pursuant to Florida Constitutional mandate requiring probable cause to be supported by "*affidavit*"; as distinguished from merely an oath or affirmation. Article I, Section 12, Florida Constitution. Section 933.18, Florida Statutes, prohibits the search of a private dwelling unless affiant sets forth "*specific facts*" establishing probable cause that the evidence sought would be found "*inside*" that home. Simply put, the affidavit must contain *both* a "*statement of belief*", by the affiant that the items to be seized are "inside" the dwelling, and "*specific facts*" upon which that belief is justifiably predicated. The instant affidavit

contains neither. Appellant's private home was searched, with a fine tooth comb, by a team of officers, under the auspices of a warrant arising from an affidavit containing no *allegation that marijuana was "inside"* the home, or for that matter, "inside" any other building near that home. In addition, the affidavit is devoid of "specific facts" supporting the missing assertion that the items to be seized were "inside" the house. Speculation will not do. Reading between the lines is constitutionally prohibited. The language and meaning of the pertinent authority, Article I, Section 12, Florida Constitution and Section 933.18, Florida Statutes, is unmistakably clear. The affidavit is plainly insufficient and as a consequence, the search of the dwelling, resulting in the seizure of evidence connecting Appellant to the crime, must be invalidated.

2. This honorable Court has overlooked or failed to consider the "particularity" requirement of the Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Consitution, as construed in the recent Florida decision, *Pezella v. State*, 390 So. 2d 97 (Fla. 3d DCA 1980). That Court, citing the United States Supreme Court in *Marron v. United States*, 275 U.S. 192 (1927), invalidated a search pursuant to a warrant in which the command portion was unconstitutionally overbroad. The command failed to adequately limit the officers' discretion on the "items to be seized". Similarly, the command in the instant warrant failed to limit the officers and, in fact, empowered them to search for *anything* of evidentiary value. There is no qualifying language in the command; no restriction as to what may be searched for and seized. As a result, the ensuing search and analysis of every item of Appellant's personal property on the premises, under the general warrant at bar, cannot be permitted to stand.

3. This honorable Court overlooked the only justification offered by the State for seizures outside the scope of the instant search warrant, and, in addition, failed to consider the pertinent case law, *Mincey v. Arizona*, 437 U.S. 385, 395 (1978), wherein the Supreme Court rejected that same justification offered by the State of Arizona. The burden of establishing the legality

of seizures not authorized by a warrant rests with the State: *Bicking v. State*, 293 So.2d 395 (Fla. 1st DCA 1974). The State, in an attempt to justify the hundreds of seizures outside the scope of the instant warrant propounded a so-called exception to the warrant requirement - - a "crime scene exception" - - allowing them to "process" the area suspected of criminal activity. [See L.R. 260]. The United States Supreme Court, in *Mincey*, supra, expressly rejected this argument and reiterated that warrantless seizures must be supported by traditional exceptions to the warrant requirement. The State, in the case *sub judice*, offered none. Thus, the search, and seizure of the only evidence linking the Appellant to the crime, must fail.

4. Appellant, LOCKE, also adopts and incorporates herein all grounds contained in Appellant FLAGE'S MOTION FOR REHEARING filed with this Court on Monday, 8 June 1981.

WHEREFORE, Appellant, RONALD C. LOCKE, moves this Court for a REHEARING in the above-styled cause, or, in the alternative, requests that this Court enter its Order reversing the Order of the Trial Court denying the Defendant's MOTION TO SUPPRESS EVIDENCE.

Respectfully submitted,
LAW OFFICES OF LARRY G. TURNER, PA

/S/Tom Kurrus
LARRY G. TURNER
THOMAS W. KURRUS
204 West University Avenue, Suite 6
Post Office Box 508
Gainesville, Florida 32602
(904) 375-4460

I HEREBY CERTIFY copy hereof has been furnished by mail to Michael L. Bryant, Post Office Box 1168, Gainesville, Florida, 32602, and the Attorney General, The Capitol, Tallahassee, Florida 32301, this 5th day of June, 1981.

/S/ Thomas Kurrus
THOMAS W. KURRUS

IN THE DISTRICT COURT OF
APPEAL FIRST DISTRICT

CASE NO: XX-449
YY-31

RONALD C. LOCKE, and
LESLIE L. FLAGE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

COMES NOW, Appellant, LESLIE L. FLAGE, by and through his undersigned attorney, pursuant to Rule 9.330 *Fla. R. App. P.*, and moves this Court for Rehearing and as grounds therefor states:

1. Appellant believes the Court misapprehended or overlooked the prejudice that Appellants suffered by the refusal of the trial Court to suppress evidence other than marijuana which was seized outside the scope of the warrant. This prejudice stems from the fact that this illegally seized evidence constituted the only link the State could produce between Appellants and the premises.

2. Appellant believes the Court misapprehended or overlooked the prejudice suffered by Appellants by the refusal of the trial Court to dismiss Count I. Even though Appellants pled Nolo Contendere to a lesser charge, that plea was entered while Appellants faced the spectre of a mandatory 25 year minimum sentence under Count I. Appellants were forced to forego their Constitutional right to a jury trial in order to avoid a charge for which prosecution would have been unconstitutional due to illegal distruction of evidence.

3. Appellant Flage also adopts and incorporates herein all grounds presented by Appellant RONALD C. LOCKE in his Motion for Rehearing filed in the Appeal.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Supreme Court Building
Tallahassee, Florida 32304
Telephone No. (904) 488-6152

August 21, 1981
CASE NO. XX-449, YY-31

LESLIE FLAGE and RONALD C. LOCKE

VS.

STATE OF FLORIDA

Appellant/Petitioner, Appellee/Respondent.

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above styled case on the above date:

Motions for Rehearing denied.
Requests for Oral Argument denied.
Motion to Strike Notice of Supplemental Authority denied.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:
Michael L. Bryant of Birr, Bryant & Saier, Gainesville, Fl;
Thomas W. Kurrus, Esq., Gainesville, FL; Gregory C. Smith, Assistant Attorney General, Tallahassee, FL.

/S/ Catherine Raven
Deputy Clerk

STATE of Florida, Appellant,
v.
Carlos M. BENITEZ and Esperanza Benitez,
Appellees.
No. 57834.

Supreme Court of Florida.

Feb. 12, 1981.

Rehearing Denied April 13, 1981.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, and Janet Reno, State Atty., and Arthur Joel Berger, Asst. State Atty., Miami, for appellant.

Joseph Beeler, and Brian Richard McComb, Miami, for appellees.

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, for Daniel Cowgill, amicus curiae.

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979) - Florida's newly-enacted "drug trafficking" statute - is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's ruling.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs.

IN THE DISTRICT COURT OF
APPEAL IN AND FOR THE FIRST
DISTRICT, STATE OF FLORIDA.

CASE NO: XX-447 & YY-31

RONALD C. LOCKE and LESLIE L. FLAGE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE is hereby given that RONALD C. LOCKE and LESLIE L. FLAGE, Appellants, above named, hereby appeal to the Supreme Court of the United States from the final order of the District Court of Appeal for the First District of the State of Florida, originally entered in this action on 22 May 1981 and, pursuant to the express terms of the Order, not final until time expires to file Rehearing Motion and disposition thereof if filed, which by order of the Court was denied on August 21, 1981.

This Appeal is taken pursuant to 28 USC §1257(2).

LAW OFFICES OF LARRY G. TURNER, P.A.

Post Office Box 508
Gainesville, Florida 32602
(904) 375-4460

/S/ Larry G. Turner,
BY: LARRY G. TURNER, ESQUIRE
Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been deposited in the United States Post Office or Mail Box with First Class Postage pre-paid to be delivered to: RAYMOND E. RHODES, Clerk of the District Court of Appeals for the First District of the State of Florida, Supreme Court Building, Tallahassee, Florida 32304; JIM SMITH, ESQUIRE, Attorney General, The Capitol, Tallahassee, Florida 32301; THE HONORABLE L. ARTHUR LAWRENCE, Circuit Judge, Court of Record, Third Judicial Circuit, Dixie County, Cross City, Florida 32060; ROBERT MOELLER, Assistant State Attorney, Post Office Drawer 1546, Live Oak, Florida 32060; and THE HONORABLE J. HUBERT ALLEN, Clerk of the Circuit Court for the Third Judicial Circuit of Florida, Dixie County Courthouse, Cross City, Florida 32628, this first day of October, 1981.

/S/ Larry G. Turner,
LARRY G. TURNER, ESQUIRE

STATE OF FLORIDA
COUNTY OF ALACHUA

I HEREBY CERTIFY that LARRY G. TURNER, personally appeared before me and after first being duly sworn deposes and says that:

1. He is counsel of record for Appellants and is a member in good standing of the Bar of the United States Supreme Court.
2. These documents were mailed to the parties concerned by placing them in a Post Office Box.
3. These documents were mailed on October 1, 1981.

/S/ Larry G. Turner
LARRY G. TURNER

SWORN TO AND SUBSCRIBED TO before me this 1st day of October, 1981.

/S/ Maya Still
Notary Public

My Commission Expires:
Notary Public, State of Florida at Large
My Commission Expires May 20, 1983

[served: October 1, 1981]
[filed: October 1, 1981]

CONSTITUTION OF THE UNITED STATES
AMENDMENTS

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

RATIFIED DECEMBER 18, 1865.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OFFICIAL FLORIDA STATUTES (1979)
CH. 893-DRUG ABUSE PREVENTION AND CONTROL

893.03 Standards and schedules.-The substances enumerated herein are controlled by this chapter. The controlled substances listed or to be listed in Schedules I, II, III, IV, and V are included by whatever official, common, usual, chemical, or trade name designated. The provisions of this act shall not be construed to include within any of the schedules herein contained any Excepted Prescription Drugs listed within the purview of 21 C.F.R. s 1308.32, styled "Excepted Compounds."

(1) SCHEDULE I.-A substance in Schedule I has a high potential for abuse and has no currently accepted medical use in treatment in the United States, and in its and in its use under medical supervision does not meet accepted safety standards except for such uses provided

for in s. 402.36. The following substances are controlled in Schedule I:

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances or which contains any of their salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 4-Bromo-2, 5-dimethoxyamphetamine.
2. Bufotenine.
3. Cannabis.
4. Diethyltryptamine.
5. 2,5-Dimethoxyamphetamine.
6. Dimethyltryptamine.
7. N-Ethyl-3-piperidyl benzilate.
8. Iboganine.
9. Lysergic Acid Diethylamide.
10. Mecloqualone.
11. Mescaline.
12. 4-methoxyamphetamine.
13. 5-Methoxy-3, 4-methylenedioxyamphetamine.
14. 4-Methyl-2, 5-dimethoxyamphetamine.
15. 3, 4-Methylenedioxyamphetamine.
16. N-Methyl-3-piperidyl benzilate.
17. Peyote.
18. Psilocybin.
19. Psilocyn.
20. Tetrahydrocannabinols.
21. Thiophene Analog of Phencyclidine.
22. 3, 4, 5-Trimethoxyamphetamine.

(2) SCHEDULE II.-A substance in Schedule II has a high potential for abuse and has a currently accepted by severly restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. The following substances are controlled in Schedule II:

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:

* * * *

4. Coca leaves, cocaine, or ecgoine, and any salt, compound, derivative, or preparation of coca leaves, cocaine, or ecgonine, and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

* * * *

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which containes any quantity of the following substances, including their salts, isomers, opital isomers, salts of their isomers, and salts of their optical isomers:

1. Amphetamine.
2. Methamphetamine.
3. Phenmetrazine.
4. Methylphenidate.
5. Methaqualone.
6. Amobarbital.
7. Secobarbital.
8. Pentobarbital.
9. Phencyclidine.

* * * *

893.13 Prohibited acts; penalties.-

(1)(a) Except as authorized by this chapter and chapter 500, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1) (a). (1) (b), (2) (a), or (2) (b) is guilty of a felony of the third degree, punishable as provided in s. 775.082, 775.083, and 775.084.

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084; except that the sale, delivery, or possession of in excess of 100 pounds of canabis as controlled in s. 893.03(1)(c) shall be punisable as provided in s. 893.135.

(e) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degreee, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(f) If the offense is the possession or delivery without consideration of not more than 20 grams of cannabis, as defined in this chapter, that person shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 and s. 775.083. For purposes of this subsection, ''cannabis'' shall not include the resin extracted from the plants of the genus *Cannabis*, or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences.-

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as ''trafficking in cannabis.'' If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s. 893.03(2)(a), is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendary years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this sention, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, not shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

DEFINITIONS; GENERAL PENALTIES; REGISTRATION OF CRIMINALS

892.03 Standards and schedules.-The substances enumerated herein are controlled by this chapter. The

775.082 Penalties.-

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Cout or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) For a life felony, by a term of imprisonment for life or for a term of years not less than 30;

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by improsonment for a term of years not exceeding life imprisonment;

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years;

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For amisdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

775.083 Fines.-

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s.

775.082; when specifically authorized by statute, he may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:

(a) $15,000, when the conviction is of a life felony.

(b) $10,000, when the conviction is of a felony of the first or second degree.

(c) $5,000, when the conviction is of a felony of the third degree.

(d) $1,000, when the conviction is of a misdemeanor of the first degree.

(e) $500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.

(f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(g) Any higher amount specifically authorized by statute.

CONSTITUTION OF THE STATE OF FLORIDA, ART. V

SECTION 3. SUPREME COURT.--

* * * *

(b) JURISDICTION.--The supreme court:

* * * *

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

IN THE CIRCUIT COURT, THIRD
JUDICIAL COURT, IN AND FOR
DIXIE COUNTY, FLORIDA

CASE NO. 79-69-CF-A-31

THE STATE OF FLORIDA

VS

RONALD LOCKE, ET AL

MOTION TO DISMISS COUNTS I AND II
OF THE INFORMATION

The Defendant, RONALD LOCKE, by and through his undersigned counsel and pursuant to Rule 3.190, RCrP, moves this Court to dismiss COUNTS I and II of the INFORMATION in this cause and as grounds therefore says that:

1. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., prescribes mandatory minimum sentences without parole or other mitigation unless the State Attorney initiates a motion to reduce or suspend the sentence and, further, in that the State Attorney is vested with unbounded discretion to initiate prosecution for the same conduct under Section 893.135, Fla. Stat., and violating basic constitutional principles of division and separation of executive, legislative and judicial powers and responsibilities and contrary to the guarantee of a republican form of government, all decreed by the Constitution of the State of Florida and by Article IV, Section 4 of the Constitution of the United States.

2. COUNTS I and II are founded upon an unconstitutional statute in that subsection 3 of Section 893.135, Fla. Stat., prescribes mandatory minimum

sentences without parole or other mitigation unless the State Attorney initiates a Motion to reduce or suspend the sentence, thereby violating basic constitutional principles of division and separation of executive, legislative and judicial powers and responsibilities, and specifically:

(a) Effects an unwarranted encroachment into the judicial sentencing funcition be delegating to the executive branch (i.e., state attorney's office) the ultimate sentencing function which constitutionally must rest exclusively in the judicial branch; and

(b) Invades the courts' inherent rule-making powers by purporting to prescribe who may petition the court and under what circumstances.

All of the above being contrary to the guaranty of a republican form of government, as decreed by Article II, Section 3 and Article V, Section 1 of the Constitution of the State of Florida.

3. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "substantial assistance" in the investigation or prosecution of others, thus conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent and penalizing him for the exercise of that constitutional right, all in vilation of the privilege against self-incrimination protected by article I, Section 9, of the Constitution of the State of Florida and by the Fifth and Fourteenth Amendments to the Constitution of the United States, contrary to our accusatorial as opposed to inquisitorial system of justice which is implicit in our traditions and organic law, denying the Defendant due process of law guaranteed by Article I, Section 9, of the Constitution of the State of Florida and by the Fourteenth Amendment to the Constitution of the United States and invading the inherent and basic rights of the People contrary to Article I, Sections 1, 2, 4, 5 and 12 of the Constitution of the State of Florida and the First, Fourth, Ninth and

Fourteenth Amendments of the Constitution of the United States.

4. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., essentially enacts a new offense of failing to inform against fellow citizens and other persons, all in violation of the rights set forth in Item 5 immediately above and contrary to basic precepts of a free society.

5. COUNTS I and II are founded upon an invalid and unconstitutional statute in that the first degree felony status and the mandatory minimum sentence provisions of Section 893.135 are entirely disproportionate to the severity and blameworthiness of the crime when applied to marijuana offenses and to the facts of the Defendant's case and are entirely disproportionate to any deterrent effect, penological goal or other valid social purpose justifying the santions and, further, are unreasonable and arbitrary since they impose sanctions without consideration of the individual Defendant's degree of culpability in the offense, so that the INFORMATION imposes excessive, cruel and unusual punishment and denies due process of law, as well as other basic rights, especially as applied in the instant case, all in violation of Article I, Sections 2, 4, 9 and 17, of the Constitution of the State of Florida, and of the First, Eighth and Fourteenth Amendments to the Constitution of the United States.

6. Moreover, and more particularly, the potential for arbitrary, punitive and/or discriminatory application in the reduction and suspension of sentences and in the choice of sanctions by proceeding either under Section 893.135 with its penalties or only under the less severe provisions of Section 893.13(1) in the prosecution of the same behavior of the laws, are in violation of Article I, Section 2, 4, 9 and 17, of the Constitution of the State of Florida and of the First, Eight and Fourteenth Amendments of the Constitution of the United States.

7. The application of the trafficking first degree felony provisions, i.e., Section 893.135, Fla. Stat., in this case

constitutes selective and discriminatory prosecution of the Defendant who has been invidiously singled out of a large class of violators in derogation of his rights to freedom of speech and press and to equal protection of the laws as guaranteed by Article I, Sections 1, 2, 4 and 9 of the Constitution of the State of Florida and by the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

8. COUNTS I and II are founded upon an unconstitutionally vague, indefinite, uncertain, overbroad and arbitrary statute, to-wit: Section 893.135, Fla. Stat., including but not limited to the provisions of sub-sections (2) and (3) thereof which condition liberty upon the following terms:

(a) that the State Attorney ''may'' move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion;

(b) that the State Attorney's motion be made only in connection with a Defendant who provides ''substantial assistance'' in the investigation and prosecution of others;

(c) that the judge ''may'' reduce or suspend a sentence without standards or guidelines for the exercise of such discretion;

(d) that the judge find that the Defendant rendered ''substantial assistance'' in the investigation and prosecution of others; and,

(e) that the benefits are available only to Defendants who have accomplices, accessories,

co-conspirators or principals in the crime and only when the State Attorney requires, and the Defendant is capable of rendering, substantial assistance in their identification, arrest and conviction, all in violation of Article I, Sections 1, 2, 4, 5 and 9 of the Constitution of the State of Florida, and of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

9. COUNTS I and II are founded upon invalid and unconstitutional statute in that Section 893.125, Fla. Stat., violates the due process clause of Article I, Section 9 of the Constitution of the State of Florida and the Fifth Amendment of the Constitution of the United States in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite and uncertain.

10. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., makes it a serious felony to knowingly sell, manufacture, deliver or be in actual or constructive possession of various stated quantities of the specified controlled substance unless specifically authorized, said statute thus failing to require willful, deliberate, intentional, purposeful, voluntary or wrongful behavior on the part of the accused to do something which the law forbids and, further, said statute thus permitting the accused to be convicted without *mens rea* and even on account of involuntary status, all denying due process, constitttuting cruel and unusual punishment and unjustifiably invading the inherent and basic rights of the people in violation of Article I, Sections 1, 2, 9 and 17 of the Constitution of the State of Florida and of the Eight, Ninth and Fourteenth Amendments to the Constitution of the United States.

11. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant cooperates to the satisfaction of the State Attorney and/or the sentencing judge and, therefore, inherently and necessarily infringes upon the Defendant's basic

constitutional right to have the accusations against him proved by the State to the satisfaction of a jury, all in violation of the basic rights of the accused guaranteed by Article I, Sections 2, 9, 16, 17, 21 and 22, of the Constitution of the State of Florida and by the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States.

12. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135(3) allows for incamera presentation of the State's motion to mitigate, thereby unlawfully circumscribing freedom of speech and of the press and the people's right to be informed of the workings of government in violation of Art., I, Section 4 of the Florida Constitution, and the First Amendment to the Constitution of the United States.

13. COUNTS I and II are founded upon an invalid and unconstitutional statute in that the act requires that mandatory minimum sentences be imposed, without parole or other limitation, unless the prosecuting attorney moves to reduce or suspend sentence, thus granting state attorneys unrestrained discretion to withhold such recommendation and taking from the courts discretion to impose limitations *sua sponte*, in violation of defendants' rights to due process under the Constitutions of Florida and of the the United States.

14. COUNTS I and IIare founded upon a statute which is invalid and unconstitutional in its entirety, since the segments which are not challenged here cannot be severed from those which are unconstitutional, specifically those portions relating to the provision of "substantial assistance" and others mentioned *supra*.

I HEREBY CERTIFY copy hereof has been furnished by mail to Michael L. Bryant, Esquire, 204 West University Avenue, Gainesville, FL 32601; S. Gunter Toney, Esquire, 200 East College Avenue, Tallahassee, FL 32301; Office of the Public Defender, Post Office Drawer 1209, Lake City, FL 32055; and, Robert B. Moeller, Esquire, Assistant State Attorney, Post Office

Box 1147, Cross City, FL 32628 this 25th day of January 1980.

/S/ Larry G. Turner
LARRY G. TURNER
Suite 6
204 West University Avenue
Post Office Box 508
Gainesville, FL 32602
904/375-4460

IN THE CIRCUIT COURT OF THE
THIRD JUDICIAL CIRCUIT, IN
AND FOR DIXIE COUNTY, FLORIDA.

CASE NO. 79-774-FM

STATE OF FLORIDA,
Plaintiff,

VS

LESLIE FLAGE,
Defendant.

MOTION TO DISMISS COUNTS I AND II
OF THE INFORMATION

The Defendant, LESLIE FLAGE, by and through his undersigned counsel and pursuant to Rule 3.190, RCrP, moves this Court to dismiss COUNTS I and II of the INFORMATION in this cause and as grounds therefore says that:

1. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., prescribes mandatory minimum sentences without parole or other mitigation unless the State Attorney initiates a motion to reduce or suspend the sentence and, further, in that the State Attorney is vested with unbounded discretion to initiate prosecution for the same conduct under Section 893.135, Fla. Stat., and violating basic constitutional principles of division and separation of executive, legislative and judicial powers and responsibilities and contrary to the guarantee of a republican form of government, all decreed by the Constitution of the State of Florida and by Article IV, Section 4 of the Constitution of the United States.

2. COUNTS I and II are founded upon an unconstitutional statute in that subsection 3 of Section 893.135, Fla. Stat., prescribes mandatory minimum

sentences without parole or other mitigation unless the State Attorney initiates a Motion to reduce or suspend the sentence, thereby violating basic constitutional principles of division and separation of executive, legislative and judicial powers and responsibilities, and specifically:

(a) Effects an unwarranted encroachment into the judicial sentencing funcition be delegating to the executive branch (i.e., state attorney's office) the ultimate sentencing function which constitutionally must rest exclusively in the judicial branch; and

(b) Invades the courts' inherent rule-making powers by purporting to prescribe who may petition the court and under what circumstances.

All of the above being contrary to the guaranty of a republican form of government, as decreed by Article II, Section 3 and Article V, Section 1 of the Constitution of the State of Florida.

3. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "substantial assistance" in the investigation or prosecution of others, thus conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent and penalizing him for the exercise of that constitutional right, all in vilation of the privilege against self-incrimination protected by article I, Section 9, of the Constitution of the State of Florida and by the Fifth and Fourteenth Amendments to the Constitution of the United States, contrary to our accusatorial as opposed to inquisitorial system of justice which is implicit in our traditions and organic law, denying the Defendant due process of law guaranteed by Article I, Section 9, of the Constitution of the State of Florida and by the Fourteenth Amendment to the Constitution of the United States and invading the inherent and basic rights of the People contrary to Article I, Sections 1, 2, 4, 5 and 12 of the Constitution of the State of Florida and the First, Fourth, Ninth and

Fourteenth Amendments of the Constitution of the United States.

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5. COUNTS I and II are founded upon an invalid and unconstitutional statute in that the first degree felony status and the mandatory minimum sentence provisions of Section 893.135 are entirely disproportionate to the severity and blameworthiness of the crime when applied to marijuana offenses and to the facts of the Defendant's case and are entirely disproportionate to any deterrent effect, penological goal or other valid social purpose justifying the santions and, further, are unreasonable and arbitrary since they impose sanctions without consideration of the individual Defendant's degree of culpability in the offense, so that the INFORMATION imposes excessive, cruel and unusual punishment and denies due process of law, as well as other basic rights, especially as applied in the instant case, all in violation of Article I, Sections 2, 4, 9 and 17, of the Constitution of the State of Florida, and of the First, Eighth and Fourteenth Amendments to the Constitution of the United States.

6. Moreover, and more particularly, the potential for arbitrary, punitive and/or discriminatory application in the reduction and suspension of sentences and in the choice of sanctions by proceeding either under Section 893.135 with its penalties or only under the less severe provisions of Section 893.13(1) in the prosecution of the same behavior of the laws, are in violation of Article I, Section 2, 4, 9 and 17, of the Constitution of the State of Florida and of the First, Eight and Fourteenth Amendments of the Constitution of the United States.

7. The application of the trafficking first degree felony provisions, i.e., Section 893.135, Fla. Stat., in this case

constitutes selective and discriminatory prosecution of the Defendant who has been invidiously singled out of a large class of violators in derogation of his rights to freedom of speech and press and to equal protection of the laws as guaranteed by Article I, Sections 1, 2, 4 and 9 of the Constitution of the State of Florida and by the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

8. COUNTS I and II are founded upon an unconstitutionally vague, indefinite, uncertain, overbroad and arbitrary statute, to-wit: Section 893.135, Fla. Stat., including but not limited to the provisions of sub-sections (2) and (3) thereof which condition liberty upon the following terms:

(a) that the State Attorney ''may'' move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion;

(b) that the State Attorney's motion be made only in connection with a Defendant who provides ''substantial assistance'' in the investigation and prosecution of others;

(c) that the judge ''may'' reduce or suspend a sentence without standards or guidelines for the exercise of such discretion;

(d) that the judge find that the Defendant rendered ''substantial assistance'' in the investigation and prosecution of others; and,

(e) that the benefits are available only to Defendants who have accomplices, accessories,

co-conspirators or principals in the crime and only when the State Attorney requires, and the Defendant is capable of rendering, substantial assistance in their identification, arrest and conviction, all in violation of Article I, Sections 1, 2, 4, 5 and 9 of the Constitution of the State of Florida, and of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

9. COUNTS I and II are founded upon invalid and unconstitutional statute in that Section 893.125, Fla. Stat., violates the due process clause of Article I, Section 9 of the Constitution of the State of Florida and the Fifth Amendment of the Constitution of the United States in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite and uncertain.

10. COUNTS I and II are founded upon an invalid and unconstitutional statute in that Section 893.135, Fla. Stat., makes it a serious felony to knowingly sell, manufacture, deliver or be in actual or constructive possession of various stated quantities of the specified controlled substance unless specifically authorized, said statute thus failing to require willful, deliberate, intentional, purposeful, voluntary or wrongful behavior on the part of the accused to do something which the law forbids and, further, said statute thus permitting the accused to be convicted without *mens rea* and even on account of involuntary status, all denying due process, constittuting cruel and unusual punishment and unjustifiably invading the inherent and basic rights of the people in violation of Article I, Sections 1, 2, 9 and 17 of the Constitution of the State of Florida and of the Eight, Ninth and Fourteenth Amendments to the Constitution of the United States.

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constitutional right to have the accusations against him proved by the State to the satisfaction of a jury, all in violation of the basic rights of the accused guaranteed by Article I, Sections 2, 9, 16, 17, 21 and 22, of the Constitution of the State of Florida and by the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States.

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14. COUNTS I and IIare founded upon a statute which is invalid and unconstitutional in its entirety, since the segments which are not challenged here cannot be severed from those which are unconstitutional, specifically those portions relating to the provision of "substantial assistance" and others mentioned *supra*.

I HEREBY CERTIFY that a copy hereof has been furnished by mail to LARRY G. TURNER, ESQUIRE, Post Office Box 508, Gainesville, Florida, 32602; S. GUNTER TONEY, ESQUIRE, 200 East College Avenue, Tallahassee, Florida, 32301; Office of the Public Defender, Post Office Drawer 1209, Lake City, Florida, 32055; and ROBERT B. MOELLER, ESQUIRE,

Assistant State Attorney, Post Office Box 1147, Cross City, Florida, 32628, this 29th day of January, 1980.

BIRR, BRYANT & SAIER, P.A.

/S/ Michael L. Bryant
MICHAEL L. BRYANT
Post Office Drawer 1168
Gainesville, Florida 32602
(904) 375-1000
Attorney for Defendant FLAGE

IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
DIXIE COUNTY, FLORIDA

CASE NO. 79-69-CF-A-31

THE STATE OF FLORIDA

VS

RONALD LOCKE, ET AL

DEFENDANT LOCKE'S
MEMORANDUM IN SUPPORT OF MOTION
TO DISMISS

I

FLORIDA STATUTE SECTION 893.135 VIOLATES
THE SEPARATION OF POWERS DOCTRINE
PROVIDED FOR IN THE CONSTITUTION
OF THE STATE OF FLORIDA

On April 6, 1979, Florida Statute Section 893.135 became law. By its provisions, it is unlawful to knowlingly sell, manufacture, deliver, bring into the State, or knowingly be in actual or constructive possession of specified amounts of certain controlled substances or mixtures containing certain controlled substances. It provides, as penalty for its violation, a range of sentences ranging from a mandatory minimum term of imprisonment of three (3) years and $25,000.00 fine for possession of in excess of 100, but less than 2,000 pounds of cannabis, to a mandatory minimum term of imprisonment to twenty-five (25) years and $500,000.00 fine for possession of 28 grams or more of

heroin. Fla. Stat. Section 893.135(1)(a)(1) and (1)(c)(3) (1979).

Subsection two and three read, in full, as follows:

> (2) Notwithstanding the provisions of Section 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be elegible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.
>
> (3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Thus, by these sections, the sentencing court may not reduce or suspend the sentence of a person convicted of violating any provisions of subsection One, unless an appropriate motion is first made by the State Attorney.

Whether Florida Statute Section 893.135 violates the separation of powers doctrine goes to the heart of the Judiciary's existence as an independent and co-equal partner in Florida's criminal justice system. Article II, Section 3 of the Florida Constitution requires that the legislative, executive and judicial powers be separately exercised by the three branches of government. In full it provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein. Fla. Const. Art, II, Sect. 3.

A review of the Constitution's later provisions will show that the legislature has been given the power to pass laws making certain acts criminal. *Id.* at Art. 3, Section 6, 7, 8 and 9. The executive branch is required to make sure that those laws are faithfully executed, *Id.* at Art. IV, Section 1, while the judicial power of the State of Florida is vested in its Courts. *Id.* at Art. V, Section 1.

Florida Statute, Section 893.134 does not provide for a reduction, suspension or probation of its mandatory minimum sentences absent a motion by the State Attorney. Fla. Stat. Section 893.135(3). Although it has been held that the fixing of minimum and maximum terms of imprisonment for criminal convictions is exclusively within the province of the legislature, imposition of punishment is a matter for the trial court in the exercise of its discretion. *Shellman v. State*, 222 So.2d 789 (Fla. 2d DCA 1969). In *Shellman*, the defendant plead guilty to breaking and entering an automobile with the intent to commit any crime and received a ten (10) year sentence. In an attack of the sentence as cruel and unusual, the court said:

> Concededly, this may be a harsh maximum punishment, considering that breaking and entering the dwelling of another with the intent to commit a misdemeanor is punishable in the state prison not exceeding five years, Fla. Stat. Section 810.05 F.S.A. But the fixing of minimum and maximum terms of imprisonment for criminal convictions is exclusively the province of the legislature, and the imposition of punishment within such limitations is a matter for the trial court in the exercise of its discretion... *Id.* at 790.

Thus, the Court is not free to ignore a legislatively imposed minimum sentence because the boundaries of

criminal sentences are peculiarly questions of legislative policy. *United States v. Burgin*, 523 F.2d 1099, 1121 (D.C. Cir. 1975) Cert. denied, 425 U.S. 961. Yet in the statute under review, the only trigger mechanism which can alter the court's power to sentence a defendant for less than the mandatory minimum term of imprisonment provided is vested in the State Attorney, a member of the executive branch of government.

The role of the court is encroached upon by vesting the State Attorney with the only procedural tool by which the court will be able to defer, withhold or suspend a mandatory minimum sentence. In identifying the relative role of the court with regard to sentencing a defendant convicted of a criminal act, one court explained:

> ...a fundamental and essential element of the administration of criminal justice is that the judge will have the ultimate responsibility in passing sentences unfettered by improper influence and based upon *his* objective determination, guided by *his* wisdom and justice. *United States v. Hernandez*, 471 F.2d 1209 (9th Cir. 1972)

The first sentence of Section One, Subsection Three, of the statute reads:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals.

Thus, by its express terms, the only criteria afforded the State Attorney, upon which he is to base his decision of whether or not to move for a reduction or suspension of the sentence, is his subjective opinion of the degree of assistance any particular defendant has given the State. In essence, the legislature has given the State Attorney the power, in his sole discretion, to arbitrarily place into motion the machinery necessary for less than the mandatory minimum sentence to be imposed. Such

legislative delegation and judicial encroachment is improper. Accord, *Thompson v. State*, 342 So.2d 52, 55 (Fla. 1977). Such unlimited discretion in forming an opinion as to whether substantial assistance has been given by a particular defendant is not proper when devoid of any standards whatsoever. It is essential that an act which delegates power also defines with reasonable certainty standards to guide the exercise of such power. *See, Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273, 275 (Fla. 1962). In *Delta*, the court said:

> Applying this rule to the particular language of the statute here involved, it is obvious that the legislative delegation of power to the respondent Commission is totally devoid of any standards whatsoever. It leaves to the Commission the authority to exercise an unlimited discretion in forming its opinion as to when and how "the public interest may be best served." The legislature has not in any degree laid down a rule which defines, even generally, what constitutes "the public interest." *Id.* at 275.

The same is true with this statute's use of the words "substantial assistance." As in *Delta, supra*, the legislature has not placed any guidelines by which the State Attorney is to determine when a defendant has provided "substantial assistance." "The classic criterion for assessing the validity of a statutory classification is whether that classification rests upon some ground of difference having a fair and substantial relation to the object of the legislation, *so that all persons similarly circumstanced shall be treated alike.*" *State v. Lee*, 356 So.2d 276, 279 (Fla. 1978). (Emphasis added)

Countless examples of situations come to mind where a defendant would divulge everything he knew to the prosecutor, yet the prosecutor may not consider the information beneficial or sufficient enought to move the Court for a reduction, suspension or probation of its sentence. The awesome power which has been conferred upon the State Attorney is perhaps best

illustrated by the simple fact that under this statute, the prosecutor may arbitrarily and capiriciously, in his sole discretion and without word of explanation to anyone, simply refuse to move for reduction or suspension of a sentence, even where the facts would ordinarily clearly justify such relief. Such possiblilities and the lack of sufficient guidelines denies equal protection of the laws; (see generally, 21 Am. Jur. 2d Section 582) places upon the State Attorney a power properly vested in the judiciary; and is an impermissible delegation of legislative power. *Compare Delta* and *Hernandez, supra.*

No doubt, prosecutorial discretion is permissible to an extent. However, the executive discretion vested in the State Attorney in the statute at bar, is prohibited because it, effectively, allows him to decide what punishment is proper. *See, Thompson v. State*, 342 So. 2d 52, 55 (Fla. 1977). As the Thompson court said:

> A prohibited form of discretion would exist if this or any other statute conferred on the executive branch a discretionary authority it does not have already or which, for all practical purposes, is equivalent to the law-making power itself. *Id.* at 55.

The determination of penalities to be imposed is not an executive but rather a legislative concern. *Hamilton v. State*, 366 So.2d 8, 11 (Fla. 1978).

Furthermore, to allow the State Attorney's sole discretion to play such a significant role in the imposition of a sentence vitiates the fundamental nature of a "sentence." By its definition, a "sentence" is not to be so controlled by the State Attorney as to deny the judge his power. For example, in defining "sentence" Corpus Jurisprudence Secundum 2d, provides:

> *As a legal term.* In law, and in its broadest sense, a "sentence" is a judicial determination, judgment, or decree; a judicial determination of a cause agitated between real parties, on which a real interest has been settled; a judgment or judicial declaration made by a judge in a cause; a

decision or judgment pronounced by a court. 79 C.J.S. 1042

Research has revealed no other instance where the legislature has, heretofore, provided a procedure of having a sentence determined other than by the Court, (Cf. Fla. Cr.P. 3.700 and 3.720). In *Rhynes v. State*, 312 So.2d 520 (Fla. 4th DCA 1975) the Court held that any statute which interferes with the discharge of the judicial function of sentencing is not controlling when it conflicts with a rule of procedure regulating sentencing. *Id.* at 521. Any legislative attempt to create rules of practice or procedure would be an intrusion upon the power of the Supreme Court and thus violative of the doctrine of separation of powers, unless the enactment is substantive rather than procedural. *Johnson v. State*, 308 So.2d 127 (Fla. 1st DCA 1975). No doubt it is proper for the prosecution to make recommendations with reference to sentencing, but it is universally held that it is improper for the prosecution to invade the discretion of the trial court by effectively determining the minimum sentence, *See, Spalding v. State*, 330 N.E. 2nd 774 (Ind. 3d Dist. C.A. 1975), or having control over, or interfering with the court's discretion at sentencing. Accord, *People v. Superior Court*, 130 Cal. Rptr. 548 (Cal. 2d Dist. C.A. 1976); *People v. Fredericks*, 362 N.Y.S. 2d 952 (N.Y. 1974); *People v. Selitoff*, 360 N.Y.S. 2d 623 (N.Y.S.C. 1974).

Chief Justice Bird's concurring and dissenting opinion in *People v. Tanner*, 23 Cal. 3d 16, (Cal. 1978) (on rehearing, reversed on other grounds, 24 Cal. 3d___1979) clearly articulates the relative role of the prosecution and the court with respect to sentencing.

> It is the constitutional duty of this court to ensure that the essential functions of the judicial branch of government are safeguarded from encroachment by the co-equal legislative and executive branches. (Cal. Const., Art. III, §3). Three times in this decade this court has unanimously held that sentencing courts *alone* have the power to determine whether a penalty should be enhanced. Citations omitted).

* * * * * *

Article III, Section 3 of the California Consittution provides that "[t]he powers of the state government are legislative, executive and judicial." The judicial power of the state government is vested by the Constitution in the courts alone. (Cal. Const., Art. VI, §1; cf. Cal. Const., Art. IV, §1 ("The legislative power of the State is vested in the California Legislature..."); Cal. Const., Art. V, §1 (The supreme executive power of this State is vested in the Governor.").)

The Constitution further provides that "[p]ersons charged with the exercise of one power (of state government) may not exercise either of the others except as provided by this Constitution," (Cal. Const., Art. III, §3.) Thus, because of this requirement of separation of powers "the exercise" of a judicial power may not be conditioned upon the approval of either the executive or legislative branches of government.... (Citation ommitted) "The judicial power must be independent..." (Citation omitted).

* * * * * *

This court suggested more than 20 years ago that "in respect to constitutionally vested judicial power" the adjudication of determination of penalty enhancement factors are "inherently and essentially the province of the court." (Citation omitted). The court reasoned that a trial judge has inherent constitutional power under the separation of powers clause to "control the proceedings before it insofar as the essentials of the judicial process are concerned..."

* * * * * *

> When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature. (Citation omitted). *Id.* at 39, 40.

II

THIS STATUTE MUST BE FOUND UNCONSTITUTIONAL AS IT CONSTITUTES A PENALTY FOR ASSERTING ONE'S PRIVILEGE AGAINST SELF-INCRIMINATION

This new statute seeks to compel information which naturally and necessarily is self-incriminatory but it provides no co-extensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosecution pending or which may be brought against the subject, basic precepts of our accusatorial system of justice are offended. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967), the Supreme Court stated:

> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.*** We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

So stating, the Supreme Court found a waiver of immunity invalid when coerced by the threat of the loss of policemen's job.

In a comparison case to *Garrity, supra,* the Supreme Court extended the protection of the Fifth Amendment not only to the exclusion of testimony coerced by the threat of penalty in any subsequent criminal proceedings, but also to invalidating the penalty of

disbarment imposed for the assertion by a lawyer of his Fifth Amendment right not to respond to a Subpoena *duces tecum*. *Spevak v. Klein*, 385 U.S. 511, 87 S. Ct. 625 (1967), 17 L.Ed.2d 574. The Court stated, 385 U.S. at 515:

> In this context "penalty" is not restricted to fine or Imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of *any sanction which makes assertion of the Fifth Amendment privilege "Costly."* (Emphasis added)

Accord, *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), (statute which attempted to coerce the waiver of ones privilege against self-incrimination without immunity by the penalty of loss of employment was held constitutionally invalid); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 284, 88 S.Ct. 1917, 29 L.Ed. 2d 1089, (1968) (state action of giving public employees "a choice between surrendering their constitutional rights or their jobs" was unconstitutional). The Court in *Spevack* found that disbarment was indeed "costly", 385 U.S. at 516:

> The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as much an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him..." (Citations omitted).

In *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973), the Supreme Court confronted a state statute which penalized public contractors who refused to answer questions when called before a grand jury. The statute sought to compel testimony, without any guarantee of immunity, by cancelling any pending contracts as well as prohibiting any further business transactions of the witness with the State. Again, following its earlier holding in *Garrity, Gardner, Sanitation Men*, and *Spevack*, the Court held such

coercion unconstitutional. In *Turley*, the Court stated 414 U.S. at 83.:

> We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contract to a contractor.

The Florida courts have followed this line of authority and have held that one cannot be constitutionally coerced to waive one's right against self-incrimination by threat of job loss. *See, e.g., Anson v. Department of Revenue*, 354 So.2d 386 (Fla. DCA 1977); *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973).

There is, however, a great difference between job loss or loss of contractual promises as involved in the cases cited above, and the loss of liberty and the right to individual sentencing consideration and/or leniency involved in the case before this Court. Certainly the loss of liberty must demand as much if not more protection by the Fifth Amendment than the threat of pecuniary loss.

And so the federal courts have uniformly recognized. Where judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant at sentencing and have expressly stated that these factors will determine the sentence they impose, those sentences have been vacated as unconstitutionally coercive, upon the same rationale as those cases cited above. For example, *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), the sentence imposed was vacated upon a post-conviction remedy application under 28 U.S.C. §2255 and was remanded for resentencing because the trial judge had indicated that if the defendant would confess his guilt as sentencing he would receive a more lenient sentence but if defendant persisted in his denial of wrongdoing, the court would take that into account. In vacating the sentence the Fifth Circuit stated, 368 F.2d at 946:

> When Thomas received harsher punishment than

> the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty by exercising his constitutionally guaranteed rights.

In *United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974), the Fifth Circuit again remanded a case for resentencing because the judge had pressured the defendants to tell the truth about their involvement in the crime or face a harsher sentence. The Court reiterated that a defendant retains important Fifth Amendment rights even after a jury verdict, *see also United States v. Yurasovich*, 580 F.2d 1212 (3rd Cir. 1978), and that a defendant therefore cannot be constitutionally placed in the position of either abandoning those rights or risking a harsher sentence.

In a case strikingly similar to the statutory sentencing procedure embodied in §893.135, Fla. Stat., the Fifth Circuit also vacated a sentence where the trial court had urged a defendant to identify his co-conspirators. *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974). The trial court had said that was the first step towards rehabilitation and that a lesser sentence would be considered if the defendant gave material and productive cooperation to the government. The Fifth Circuit held that there was no distinction between confessing guilt and possibly implicating on's own self by implicating others. Therefore, to request such assistance was as much an unconstitutional imposition upon one's right to remain silent as confessing guilt was. Accord, *United States v. Acosta*, 501 F.2d 1330, 1337-78 (5th Cir. 1974) (dissenting opinion of Judge Gee captioned "The Sentencing Procedure") adopted en banc, 509 F.2d 539 (5th Cir. 1975). As it was persuasively stated in *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976):

> The Appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consider-

ation at the bar of justice: They had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand.

Contrary to this well-settled body of law, under sub-section (3), the Florida Legislature mandates this unconstitutional, coercive method of obtaining evidence. Worse, the Legislature seeks to force the Judicial Branch to embrace this unconstitutional sentencing procedure. But the very purpose of the Judiciary is to protect the accused against the excess of the Legislature and the Executive and to defend the State and Federal Constitutions from encroachment.

III

THE STATUTE IS UNCONSTITUTIONAL AS CONSTITUTING A SEPARATE AND DISTINCT PUNISHMENT FOR THE CRIME OF FAILING TO GIVE "SUBSTANTIAL ASSISTANCE" -- A CRIME THE PUNISHMENT OF WHICH IS PROHIBITED BY THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

The statute before us, specifically sub-section (3) of §893.135, providing for the right to leniency only on the abandonment of one's privilege against self-incrimination, must kindle outrage in the hearts of all judges who have sworn to uphold the Constitutions of the State of Florida and the United States. As opposed to the invalid sentencing techniques outlined in the above Fifth Circuit cases, this statute can only be characterized as a return to the Star Chamber Oath and other historical abuses the Framers had meant the Fifth Amendment to eliminate, *Miranda v. Arizona*, 384 U.S. 436, 459-460, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Under this statute, each defendant, regardless of his individual culpability or character or prior record, will face the same mandatory minimum sentence, unless he waives his constitutional right to remain silent. Under this statute, each defendant, regardless of his potential for rehabilitation

is ineligible for parole until the termination of the mandatory minimum term (§893.135(2)) unless he waives his privilege against self-incrimination. Here, each defendant, regardless of the myriad factors in mitigation which might be present in individual cases, has only one method by which to gain individual consideration and a chance for leniency--waiver of the guarantee that he will not be compelled to testify against himself. And here, most importantly, each defendant regardless of whether he has or knows of "accomplices, accessories, co-conspirators or principals," indeed regardless of whether he can and/or wishes to provide assistance that may or may not be "substantial," can only receive individual sentencing consideration or leniency by the use of this subsection.

It is clearly possible that under the myriad of likely circumstances that might arise in prosecutions under this statute that a defendant would have no "substantial assistance" to give or that the assistance he could give would not be deemed "substantial" enough to satisfy the requirements of subsection (3). As an illustration, a trafficker's 18 year old daughter who consents to her father's request to hold the keys to a truck loaded with cannabis, may be charged under §893.135. If she has good reason to know it it loaded with marijuana, since she has the keys, the law will impute constructive possession to her. If she cannot bring herself to turn informer against her own father, or if she cannot render "substantial assistance" in his identification, arrest or conviction -- for any of a multitude of likely reasons[1] -- she will, indeed must, suffer the full mandatory minimum prison term dispite her individual high character and relative lack of blameworthiness. The possibilities of injustice are countless.[2]

1 Her father may have already been convicted; he may have made a deal to immunize himself from prosecution; he may have committed suicide out of anguish for his daughter's predicament created by himself.

2 It should be pointed out also that this punishment will most

Were the procedure provided for by subsection (3) only imposed in a few individual cases, it would be unconstitutional enough. But because the statute provides that it must be applied in each and every case brought for the substantive crimes embodied in §§893.135 and 893.13, it is itself a punishment: a punishment that is not only prohibited by the guarantee that one will not be compelled to give testimony against himself but is also arbitrary and capricious and must be outlawed as cruel and unusual punishment.

One is reminded of the insightful words of Justice Bradley in *Boyd v. United States,* 116 U.S. 616, 635, 29 L. Ed. 694, 752, 6 S. Ct. 524 (1886):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, both silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

probably be inflicted arbitrarily. Subsection (3) sets forth no guidelines for the reaping of its benefits by giving "substantial assistance." Rather, its permissive language suggests that the prosecutor has unbounded discretion whether, (1) he will consider the assistance "substantial" or not, (2) he will intercede to make known this assistance, and whether, indeed (3) he will accept such assistance when a particular defendant proffers it to him. This standardless offer of intercession is, therefore, patently arbitrary and open to capricious application, all in violation of contemporary notions of due process as embodied in the Fourteenth Amendments to the Constitution of the United States and in Article I, Section 9 of the Constitution of the State of Florida.

And so the Supreme Court in deciding *Robinson v. California,* 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962) -- adhering to the spirit expressed above -- first held that the Eighth Amendment prohibition against cruel and unusual punishment must, in addition to outlawing the use of abhorrent physical punishment, also set limits on the power of a State to prescribe what can be made a crime and punished as such. In *Robinson,* the Court held that the State cannot constitutionally punish a person for the status of being a drug addict. In explanation, the Court stated, 370 U.S. at 667:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.

Here, too, the question cannot be considered in the abstract: the question of leniency and/or a lesser sentence than the mandatory minimum prescribed by §§893.135 and 893.13 cannot be considered separate from the crime it punishes. It is rather the fact that any punishment exacted for the assertion of ones privilege against self-incrimination must, on its face, be cruel and unusual punishment, as it is beyond the power of a state to make such action a crime. Further, it is beyond the power of the State to arbitrarily punish a person who has no "substantial assistance" to give, as subsection (3) will do to all defendants who are only tangentially involved with the crime of which they are convicted -- in this context, the punishment of the loss of the right to be considered for individual sentencing consideration and/or leniency will be exacted for a "status" the defendant has no more control over than he would if he had a common cold.[3]

3 It is ironic, to say the least, that it is the "ringleader" who will be the person most appropriately situated to reap the benefits of this subsection, while the person whose involvement in the crime charged is merely peripheral and who is the least blameworthy will be the person most likely to be punished by it. Subsection (3)

It is no answer that the State may have a substantial interest in trying to curb trafficking in Florida and therefore the Legislature has a rational basis for enacting this provision. The Supreme Court stated in *Robinson, supra,* that there was no question that California had a substantial interest in trying to curb the spread of drug addiction. It stated, however, there were many ways this interest could be implemented, but one of them could not be to punish addiction as a crime.

> It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a veneral disease. A state might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eight and Fourteenth Amendments. *Id.*, 380 U.S. at 666.

So, too, here defendant would concede that the State has substantial interests in bringing to the bar of justice persons "trafficking" in controlled substances and in obtaining evidence sufficient to convict them. However, we submit, there are countless ways that the State may accomplish these interests without offending the Constitution. It may provide for a larger staff of prosecutors. Indeed, within constitutional limits, the State may exact any penalty for the crime of trafficking

therefore stands normal sentencing procedure on its head: the defendant with the most substantial assistance to give because his contact with crime has been continual may indeed receive a suspended sentence, while a defendant who is convicted for his first brush with the law and therefore has no information to proffer to the State must be punished to the full extent of the mandatory minimum sentence.

in drugs it sees fit. However, "lifting the load of the prosecutor is no answer to the claim that a constitutional right is violated." *State v. Buchman,* 361 So. 2d 692 (Fla. 1978).

The rationale the Supreme Court applied to invalidate the status crime of drug addiction involved in *Robinson, supra,* also must invalidate the punishment of loss of individual sentencing consideration and leniency embodied in the statute under which the defendant is now charged. The Supreme Court's decision in *Robinson* was predicated upon its interpretation that the Cruel and Unusual Punishment Clause "stands to assure that this power be exercised within the limits of civilized standards" *Trop v. Dulles,* 356 U.S. 86, 100, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1959), and that punishments must be a reflection of "evolving standards of decency that mark the progress of a maturing society." *Id.,* 356 U.S. at 101.

The privilege against self-incrimination has been hailed as "one of the great landmarks of man's struggle to make himself civilized." *Ullman v. United States,* 350 U.S. 422, 426, L. Ed. 511, 76 S. Ct. 497 (1956). In *Murphy v. Waterfront Commissioner of New York,* 378 U.S. 52, 55-56, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964), the Supreme Court catalogued the policies this privilege embodies:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation , perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect for the inviolability of

the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F. 2d 556, 581-582 (Frank J., dissenting), rev'd 353 U.S. 391, 1 L. Ed. 2d 931 77 S. Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

The Florida Legislature, in making the assertion of the privilege a crime under §893.135(3), has gone beyond the bounds of its power to create and punish aberrant social behavior for the protection of its citizens. Therefore, the statute exceeds the "substantive limits of what can be made criminal and punished as such" for which the decision in *Robinson, supra*, stands. *Ingraham v. Wright*, 430 U.S. 651, 667, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1971).

There have been various erroneous attempts to extend the rationale of *Robinson v. California, supra*, to prohibit any crime which lacks the element of *mens rea. See, e.g., Powell v. Texas*, 392 U.S. 514, 20 L. Ed. 2d 1254, 88 S. Ct. 2145 (1968); and there has been much discussion about what this case stands for in the abstract, *see, e.g.*, Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966). Despite these disputes, there can be no serious question that the Cruel and Unusual Punishment Clause, at the very least, now prohibits punishment for the crime of asserting a constitutional privilege. In elaborating on the extent of the decision in *Robinson*, Justice Marshall, announcing the judgment of the Court and delivering the decision in which Chief Justice Warren and Justices Black and Harlan joined, stated in *Powell v. Texas, supra*, 392 U.S. at 533:

> The entire trust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in

preventing, or perhaps in historical common law terms, has committed some *actus reus.*

Clearly, the Constitution does not permit a State to make it a crime for one to assert his privilege against self-incrimination and to exact a punishment for such a crime. The assertion of the privilege simply is not an action "which society has (or can have) an interest in preventing."

That the privilege stands as a bar to creating this substantive crime is by no means a novel idea. An entire constellation of crimes have been invalidated based upon this proposition. The United States Supreme Court, in *Marchetti v. United States,* 390 U.S. 39, 19 L. Ed. 2d 887, 88 S. Ct. 687 (1968), and *Grosso v. United States,* 390 U.S. 62, 19 L. Ed. 2d 906, 88 S. Ct. 709 (1968), held that the assertion of the Fifth Amendment privilege against self-incrimination was a complete defense to a prosecution for failure to comply with the Federal gambling registration and tax statutes. Further, in *United States v. U.S. Coin and Currency,* 401 U.S. 715, 28 L. Ed. 434, 91 S. Ct. 1041 (1971), the Court held that in forfeiture proceedings the same rationale obtains and the Fifth Amendment will act as a bar to prosecution. These decisions were predicated upon the principle that asserting one's privilege against self-incrimination is a "kind of conduct that cannot constitutionally be punished in the first instance." *United States v. U.S. Coin and Currency, supra,* 401 U.S. at 723. Likewise, the Supreme Court has held that the privilege against self-incrimination was a complete defense under the Firearems Registration Act, *Haynes v. United States,* 390 U.S. 85, 19 L. Ed. 2d 923, 99 S. Ct. 722 (1968); and that the assertion of one's privileges against self-incrimination is a complete defense to prosecution charging a violation of the Marijuana Tax Act for failing to record and pay the transfer tax the Act imposed, *Leary v. United States,* 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969); *United States v. Covington,* 395 U.S. 57, 23 L. Ed. 2d 94, 89 S. Ct. 1559 (1969). Accord, *Harrington v. United States,* 426 F. 2d 301 (5th Cir. 1970); *United*

States v. Goldberg, 426 F. 2d 285 (5th Cir. 1960); *Thompson v. Unites States*, 421 F. 2d 174 (5th Cir. 1970).

As it is stated without reservation in the above cases, the conduct of asserting one's privilege against self-incrimination is the "kind of conduct that cannot constitutionally be punished in the first instance." *United Stated v. U.S. Coin and Currency, supra*, 401 U.S. at 723. It fails for want of "some behavior, which society has an interest in preventing." *Powell v. Texas, supra*, 392 U.S. at 533. Therefore, it is condemned by the Cruel and Unusual Punishment Clause of the Constitutions of the United States and of the State of Florida. The Supreme Court of this State has expressed the identical limitation upon the power of the Legislature by finding that it is only "within constitutional limits, the legislature may prohibit any act, determine the grade or class of the offenses, and prescribe the punishment." *State v. Bailey*, 360 So. 2d 772, 773 (Fla. 1978), c.f., *Gammell v. Wainwright*, 357 So. 2d 714 (Fla. 1978) (suspending a sentence for kidnapping until end of treatment as sex offender).

IV.

NUMEROUS CIRCUIT COURTS OF THIS STATE HAVE RULED THE STATUTE UNCONSTITUTIONAL ON THE PREVIOUSLY STATED AND SIMILAR GROUNDS.

The decisions of judges in this judicial circuit and others indicate by their number how persuasive Defendants' arguments are. At least seven judges are known to have declared Florida Statute §893.135 unconstitutional in dismissing informations predicated upon it. Six of these are attached as Appendices A through F to this Memorandum; the seventh, that of Judge Baskin of the Eleventh Judicial Circuit which ruled the statute unconstitutional on the grounds that it violated guarantees against cruel and unusual punishment, was unavailable to the Defendants.

The attached cases are, in reverse chronological order, *State v. Wall,* Case No. 79-1839 (Fla. Escambia Cty. Cir. Ct., Dec. 14, 1979) (Frye, J.); *State v. Jackson,* Case No. 79-11741 (Fla. 11th Cir. Ct., Oct. 11, 1979) (Hickey, J.); *State v. Reynolds,* Case No. 79-3859 CF (Fla. 17th Cir. Ct., Oct. 8, 1979) (Moe, J.); *State v. Bilford,* Case No. 79-8211 (Fla. 11th Cir. Ct., Oct. 5, 1979) (Tanksley, J.); *State v. Newman,* Cases No. 79-9016, 79-1180GA, and 79-10158A & B (Fla. 11th Cir. Ct., Oct. 1, 1979) (Ferguson, J.); and *State v. Cuevas,* Cases No. 79-8449, 79-9076 & 79-10646 (Fla. 11th Cir. Ct., Sept. 25, 1979). All of these cases found the unconstitutional portions of the trafficking statute non-severable from the rest of the Act, and thus ruled §893.135 unconstitutional in its entirety.

V.

NOTWITHSTANDING THE SAVINGS CLAUSE, THE ENTIRE STATUTE MUST FALL AS UNCONSTITUTIONAL BECAUSE THE OTHER PROVISIONS OF THE ACT CANNOT OTHERWISE BE GIVEN PROPER EFFECT.

The mere inclusion of a "saving or severability clause" is not determinative of legislative intent or

purpose. *State v. Lee*, 356 So. 2d 276, 284 (Fla. 1978). A review of the legislative history clearly shows that the Florida Legislature did not intend for subsection (3) of §893.135 (the "substantial assistance" provision) to be severable. *See*, Transcript of the Florida Senate Proceedings in Appendix G.

Further, it was the obvious intent of the Legislature in drafting this statute that most defendants convicted thereunder would make use of this punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be accordingly applied sparingly. Therefore, once this "substantial assistance" provision is vitiated as unconstitutional, were the remainder of the statute to remain in force the fiscal impact of the law would drastically exceed the anticipation of the Legislature when they passed this law. For the analogous reasons that the Supreme Court in *Marchetti v. United States, supra*, 390 U.S. at 60, found severability inadequate to save the wagering tax laws, we submit that these fiscal consideration represent the type of considerations "the Constitution has entrusted to Congress, and not to this Court,": and "the striking an appropriate balance among such values" should be now resubmitted to the Legislature to determine. Indeed, the entire statute must fall notwithstanding the presence of a savings clause in this statute. A savings clause can only operate if the "unconsitutional portion of an Act can be logically excised from the remaining valid provisions without doing violence to the Legislative purpose" and "if the valid and invalid provisions are not so separable that the Legislature would not have enacted one without the other." *High Ridge Management Corp. v. State*, 354 So. 2d 377 (Fla. 1977), *see also, Presbyterian Homes of Synod of Florida v. Wood*, 297 So. 556, 559 (Fla. 1974); *State ex. rel, Limpus v. Newell*, 85 So. 2d 124, 128 (Fla. 1956); *State v. Calhoun County*, 127 Fla. 304, 311-13, 170 So. 883, 886 (1936). The legislative intent would be so frustrated if the remainder of the statute were left to

stand once the "substantial assistance" provision fell that the statute should be stricken in its entirety, in order that the Legislature may reassess the fiscal impact and redraft the statute in accordance with the Constitutions of the United States and the State of Florida. Nothing less will suffice.

Respectfully submitted,

/S/ Larry G. Turner
LARRY G. TURNER
Attorney for Defendant
Suite 6
204 West University Avenue
Post Office Box 508
Gainesville, FL 32602
904/375-4460

I HEREBY CERTIFY copies hereof have been delivered by mail to:

Michael L. Bryant, Esquire
204 West University Avenue,
Gainesville, FL 32601

S. Gunter Toney, Esquire
200 East College Avenue
Tallahassee, FL 32301

Office of the Public Defender
Post Office Drawer 1209
Lake City, FL 32055

Robert B. Moeller, Esquire
Assistant State Attorney
Post Office Box 1147
Cross City, FL 32628

this 30th day of January, 1980.

/S/ Larry G. Turner
LARRY G. TURNER

APPENDIX A

APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

CASE NOS. 79-9016, 79-11806A, 79-10158 A & B

FILED OCT. 1, 1979
Richard P. Brinker, Clerk

THE STATE OF FLORIDA
vs.
EDWARD C. NEWMAN,
Defendant.

THE STATE OF FLORIDA,
vs.
JORGE A. RODRIGUEZ,
Defendant.

THE STATE OF FLORIDA,
vs.
ROBERT K. WERNER and
JACK E. CARLSON,
Defendants.

All of the defendants have moved to dismiss the drug trafficking charges against them. Each has been charged with violating Section 893.135, Florida Statutes, which prohibits the sale, manufacture, delivery, importation into the state, or possession of marijuana, cocaine or heroin in excess of specified quantities as to each substance. For violation of any of these provisions, certain mandatory minimum sentences are prescribed.

1. The defendants assert the invalidity of the statute on various constitutional grounds. One of these is discussed herein as grounds for holding the statute unconstitutional. All other arguments advanced by the defendants, not addressed within the following

discussion, are specifically rejected as being without merit.

2. It is asserted by each of the defendants that Florida Statutes, Section 893.135 is unconstitutionally vague, indefinite, uncertain, overbroad and uncertain, including but not limited to the provisions of subsections (2) and (3) thereof which condition freedom from the mandatory provisions upon the following terms:

(a) that the state attorney "may" move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion;

(b) that the state attorney's motion may be made only in connection with a defendant who provides "substantial assistance" in the investigation and prosecution of others;

(c) that a judge "may" reduce or suspend a sentence without standards or guidelines for the exercise of such discretion;

(d) that the judge find that the defendant rendered "substantial assistance" in the investigation and prosecution of others.

3. It is ADJUDGED that subsection (3) of Section 893.135, Florida Statutes, violates the due process clause of Article I, Section 9 of the Constitution of the State of Florida and the Fifth Amendment to the Constitution of the United States in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite and uncertain. A review of the transcripts of the Legislative proceedings (both in Committee and on the floor) incident to passage of this Act reflect numerous occasions when the legislators themselves expressed concern that the term "substantial assistance" was unworkably vague and uncertain.

4. It is ADJUDGED that subsection (3) of Section 893.135, Florida Statutes, prescribing mandatory minimum sentences without parole or other mitigation unless the state attorney initiates a motion to reduce or suspend the sentence is violative of basic constitutional

principles of division and separation of Executive, Legislative and Judicial powers and responsibilities, and specifically:

(a) Effects an unwarranted encroachment into the judicial sentencing function by delegating to the Executive branch (i.e., State Attorney's Office) the ultimate sentencing function which Constitutionally must vest exclusively in the Judicial branch;

(b) Invades the Court's inherent rule-making powers by purporting to prescribe who may petition the Court and under what circumstances;

(c) Purports to grant the Court the power to mitigate a sentence at any time during the period of said sentence thus conflicting with existing Rules of Court which limit such jurisdiction to sixty (60) days after imposition of sentence.

5. The provision of 893.135 (3) allowing for in camera presentation of the State's motion to mitigate may also be an unlawful restraint or abridgment of liberties of speech and the press and the people's right to be informed fo the workings of government in violation of the First Amendment to the Constitution of the United States, and Article I, Section 4 of the Constitution of the State of Florida. Any rule of law or practice or procedure which excludes the public and press from any part of the sentencing phase of a criminal proceeding is unwarranted. Further, in application, it would tend to undermine the integrity of the entire judicial process. The public has a vested interest in the dispostion of persons convicted of violating its laws. The need for openness at the time of sentencing far outweighs any advantages to be derived from secrecy.

6. The state has relied upon the New York case of *People v. Eason*, 386 N.Y.2d 673 in support of its argument that the Statute is constitutional. *Eason* is distinguisable and the New York Statute in question therein accomplishes the objective intended by F.S. 893.135 without the glaring constitutional defects.

7. The New York Statute is distinguishable for the following reasons:

(a) Under the New York Statute the sentence is an indeterminate one with a one year minimum rather than a strict minimum mandatory sentence.

(b) The prosecutor's recommendation for probation must be filed orally *on the record,* or in a writing *along with the indictment.*

(c) The *Court* is duty bound to consider other factors customarily considered at the time of sentencing to include the nature and circumstances of the crime and the history, character and condition of the defendant.

(d) The *Court* is further to consider in light of a prosecutorial recommendation for probation the following:

(i) Institutional confinement of the defendant is not necessary for the protection of the public;

(ii) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision;

(iii) The defendant has or is providing material assistance in the investigation, apprehension or prosecution of a person for a felony defined in Article 220 or the attempt to commit any such felony; and

(iv) Such disposition is not inconsistent with the ends of justice.

8. Under the New York Statute, after the prosecutor has filed an indictment along with a recommendation for probation, there is no further encroachment by the Executive branch into the sentencing function; sentencing is then the exclusive responsibility of a neutral member of the Judicial branch of government.

9. Defendants argue that to compel them to assist the state in order to take advantage of the freedom from a mandatory sentence provided by subsection three(3) is violative of their Fifth Amendment privileges. This court disagrees. As was stated in *People v. Eason,* (supra):

> The subject statute was not intended to afford ameliorative relief for criminal defendants. Rather it was designed to get small fry dealers or addicts to cooperate in the apprehension and conviction of

the bigger traffickers'.

F.S. 893.135 was designed to get small dealers and couriers to cooperate in the apprehension and conviction of major suppliers - a permissible objective. Any benefits flowing to those accused under its provisions is incidental.

10. It is further ADJUDGED that notwithstanding the "saving clause" contained in Section 3 of the Act (Chapter 79-1), passed as Senate Bill 83 and signed by the Governor on April 6, 1979, the other provisions of the Act cannot be given proper effect without the provision above being declared invalid and unconstitutional for the following reasons:

(a) The mere inclusion of a "saving or severability clause" in the Act is not controlling in determining the intent and purpose of the Legislature. See *State v. Lee*, 356 So.2d 276, 284 (Fla. 1978).

(b) The court has reviewed the various transcripts reflecting the legislative history of Section 893.135, and determines that the legislature clearly did not intend for subsection (3) of Section 893.135, Florida Statutes (relating to relief for defendants who provide "substantial assistance") to be severable from the portions of the Statute imposing severe mandatory minimum sentences.

(c) In addition, it was clearly the intent and purpose of the Legislature in drafting this statute that most defendants convicted thereunder would make us of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be, accordingly, applied sparingly. Therefore, once this "substantial assistance" provision is vitiated as unconstitutional, were the remainder of the statute to remain in force, the impact both physical and otherwise of the law would drastically exceed the expectations of the Legislature.

11. This Court FINDS as follows:

(a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of Section

893.135. See *High Ridge Management Corp. v. State*, 354 So.2d 377 (Fla. 1977); *Presbyterian Homes of Synod of Florida v. Wood*, 297 So.2d 556, 559 (Fla. 1975); *State ex rel. Limpus v. Newell*, 85 So.2d 124, 128 (Fla. 1956); *State v. Calhoun County*, 127 Fla. 304, 311-13, 170 So. 883, 886 (1936);

(b) That without the provisions contained in subsection (3) being given effect, application of the statute would create a result never contemplated by the Legislature. See *State ex. rel. James v. Gerrell*, 137 Fla. 324, 330, 188 So. 812, 815 (1939) on rehearing); *Hayes v. Walker*, 54 Fla. 163, 168, 44 So. 747, 749 (1907); and

(c) That the provisions of the Act contained in subsection (3) were a clear and obvious inducement to the enactment of the other provisions of Section 893.135, specifically, subsections (1) and (2) thereof. See *State ex rel. West v. Hilburn*, 70 Fla. 55, 61-62, 69 So. 784, 786 (1915); *Dade County v. Keys*, 141 So. 2d 819, 821-22 (Fla. 3d DCA 1962), *cert.* discharged, 152 So.2d 171 (Fla. 1963).

ACCORDINGLY, subsections (1) and (2) of Section 893.135, Florida Statutes, which creates mandatory minimum sentences for the offense of trafficking in controlled substances are declared "non-severable" from subsection (3) of Section 893.135, Florida Statutes, which provide for suspension or reduction of said sentences.

It is ORDERED and ADJUDGED that, for the foregoing reasons, the respective motions of defendants to dismiss the Informations pending against them, or certain Counts thereof, be and hereby, are granted as follows:

As to case number 79-9016, the information is dismissed.

In case number 79-11806, as to the A defendant, the information is dismissed.

As to case number 79-10158, Count II of the information is dismissed.

DONE and ORDERED at Miami, Dade County, Florida this first day of October, 1979.

[S] Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
Circuit Judge

STATE OF FLORIDA
COUNTY OF DADE S.S.

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records in my office.
WITNESS MY HAND and official seal this Oct. 23, 1979
RICHARD P. BRINKER
Clerk Circuit Court
By [S] C. Downey D.C.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NOS.

79-8449,

79-9076,

79-10646

STATE OF FLORIDA,
Plaintiff,

vs.

SONIA CUEVAS, et al.,
Defendants.

STATE OF FLORIDA,
Plaintiff,

vs.

MARIO LICOR,
Defendant.

STATE OF FLORIDA,
Plaintiff,
vs.
CARLOS M. BENITEZ,
Defendant.

O R D E R

THIS matter coming on to be heard upon the Defendants' Motions to Dismiss the Information pending against them or certain Cournt thereof, and the Court having heard from the parties and being otherwise fully advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that Subsection (3) of Section 893.135, *Florida Statutes,* is declared invalid and unconstitutional for the following reasons:

1. Section 893.135 prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "Substantial assistance" in the investigation or prosecution of others, thus unfairly conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent and penalizing him for the exercise of that Constitutional right, all in violation of the privilege against self-incrimination protected by Article I, Section 9 of the Constitution of the State of Florida and by the Fifth and Fourteenth Amendments to the United States Constitution, contrary to our accusatorial, as opposed to inquisitional, system of justice which is implicit in our traditions and organic law, denying the Defendant due process of law guaranteed by Article I, Section 9 of the Constitution of the State of Florida and by the Fourteenth Amendment to the United States Constitution. Subsection (3) contains no reference to plea bargaining or pleas, whatsoever. It only operates once one is convicted and is being or has been, sentenced. It exacts a waiver of the Constitutional privilege against self-incrimination to enjoy any hope of

reducing or suspending the mandatory minimum sentences the statute imposes. But such a penalty is beyond the power of the the Legislature to demand.

This new statute seeks to compel information which naturally and necessarily is self-incriminatory but it provides no coextensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosecution pending or which may be brought against the subject, basic precepts of our accusatorial system of justice are offended. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967), the Supreme Court stated:

> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. ***We not hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

So stating, the Supreme Court found a waiver of immunity invalid when coerced by the threat of the loss of policeman's job.

In a companion case to *Garrity, supra,* the Supreme Court extended the protection of the Fifth Amendment not only to the exclusion of testimony coerced by the threat of penalty in any subsequent criminal proceedings, but also to invalidating the penalty of disbarrment imposed for the assertion by a lawyer of his Fifth Amendment right not to respond to a supoena *duces tecum. Spevack v. Klein,* 385 U.S. 511, 87 S.Ct. 625 (1969), 17 L.Ed.2d 574. The Court stated, 385 U.S. at 515:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of *any*

sanction which makes assertion of the Fifth Amendment privilege "costly." (Emphasis added) *Accord, Gardner v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913 20 L.Ed.2d 1082 (1968), (statute which attempted to coerce the waiver of one's privilege against self-incrimination without immunity by the penalty of loss of employment was held constitutionally invalid); *Sanitation Men v. Sanitation Comm'r,* 392 U.S. 280, 284, 88 S.Ct. 1917, 29 L.Ed.2d 1089, (1968) (State action of giving public employees "a choice between surrendering their constitutional rights or their jobs" was unconstitutional). The Court in *Spevack,* found that disbarrment was indeed "costly", 385 U.S. at 515:

> The threat of disbarrment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as much an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him...." (citations omitted).

In *Lefkowitz v. Turley,* 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274, (1973), the Supreme Court confronted a state statute which penalized public contractors who refused to answer questions when called before a grand jury. The statute sought to compel testimony; without any guarantee of immunity, by cancelling any pending contracts as well as prohibiting any further business transactions of the witness with the State. Again, following its earlier holding in *Garrity, Gardner, Sanitation Men,* and *Spevack*, the Court held such coercion unconstitutional. In *Turley,* the Court stated, 414 U.S. at 83.

> We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contract to a contractor.

The Florida courts have followed this line of authority and have held that one cannot be constitutionally

coerced to waive one's right against self-incrimination by threat of job loss. *See, e.g., Anson v. Department of Revenue*, 354 So.2d 386 (Fla. DCA 1977); *Lurie V. Florida State Board of Denistry*, 288 So.2d 223 (Fla. 1973).

There is, however, a great difference between job loss or loss of contractual promises as involved in the cases cited above, and the loss of liberty and the right to individual sentencing consideration and/or leniency involved in the case before this Court. Certainly the loss of liberty must demand as much if not more protection by the Fifth Amendment than the threat of pecuniary loss.

And so the federal courts have uniformly recognized. Where judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant at sentencing and have expressly stated that these factors will determine the sentence they impose, these sentences have been vacated as unconstitutionally coercive, upon the same rationale as those cases cited above. For example, *Thomas v. United States,* 368 F.2d 941 (5th Cir. 1966), the sentence imposed was vacated upon a post-conviction remedy application under 28 U.S.C. §2255 and was remanded for resentencing because the trial judge had indicated that if the defendant would confess his guilt at sentencing he would receive a more lenient sentence but if defendant persisted in his denial of wrongdoing the court would take that into account. In vacating the sentence the Fifth Circuit stated, 368 F.2d at 946:

> When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty by exercising his constitutionally guaranteed rights.

In *United States v. Rodriquez*, 498 F.2d 302 (5th Cir. 1974), the Fifth Circuit again remanded a case for resentencing because the judge had pressured the defendants to tell the truth about their involvement in the crime or face a harsher sentence. The Court

reiterated that a defendant retains important Fifth Amendment rights even after a jury verdict, see also, *United States v. Yurasovich*, 580 F.2d 1212 (3d Cir. 1978), and that a defendant therefore cannot be constitutionally placed in the position of either abandoning those rights or risking a harsher sentence.

In a case strikingly similar to the statutory sentencing procedure embodied in §893.135, *Florida Statutes*, the Fifth Circuit also vacated a sentence where the trial court had indicated its disapproval with the defendant for not cooperating with the government in identifying his co-conspirators. *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974). The trial court had said that was the first step towards rehabilitation and that a lesser sentence would be considered if the defendant gave material and productive cooperation to the government. The Fifth Circuit held that there was no distinction between confessing guilt and possibly implicating ones own self by implicating others. Therefore, to request such assistance was as much an unconstitutional imposition upon ones right to remain silent as confessing guilt was. *Accord, United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (dissenting opinion of Judge Gee captioned "The Sentencing Procedure") adopted *en banc*, 509 F.2d 539 (5th Cir. 1975). As it was persuasively stated in *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consideration at the bar of justice: They had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand.

Contrary to this well-settled body of law, under subsection(3), the Florida Legislature mandates this unconstitutional, coercive method of obtaining evidence.

2. Subsection (3) of Section 893.135, *Florida Statutes*, violates the due process clause of Article I, Section 9 of the Constitution of the State of Florida and the Fifth

Amemdment to the Constitution of the United States in that the term "Substantial assistance" used therein is unconstitutionally vague, indefinite and uncertain. Indeed, a review of the transcripts of the Legislative proceedings (both in Committee and on the floor) incident to passage of this Act reflect numerous occasions when the legislators themselves expressed concern that the term "substantial assistance" was unworkably vague and uncertain.

3. Subsection (3) of Section 893.135, *Florida Statutes*, prescribes mandatory minimum sentences without parole or other mitigation unless the state attorney initiates a motion to reduce or suspend the sentence thereby violating basic constitutional principles of division and separation of Executive, Legislative and Judicial powers and responsibilities, and specifically:

A. Effects an unwarranted encroachment into the judicial sentencing function by delegating to the Executive branch (i.e., State Attorney's Office) the ultimate sentencing function which Constitutionally must vest exclusively in the Judicial branch; and

B. Invades the Court's inherent rule-making powers by purporting to prescribe who may petition the Court and under what circumstances.

All of the above being contrary to the guaranty of a republican form of government, as decreed by Article II, Section 3 and Article V, Section 1 of the Constitution of the State of Florida.

4. Section 893.135, *Florida Statutes*, is an unconstitutionally vague, idefinite, uncertain, overbroad and arbitrary statute in that the provisions thereof condition liberty upon the following terms:

(a) That the state attorney "may" move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion; and

(b) That the state attorney's motion be made only in connection with a Defendant who provides "substantial assistance" in the investigation and prosecution of others; and

(c) That the benefits are available only to Defendants who have accomplices, accessories, co-conspirators or

principals in the crime and only when the state attorney requires, and the Defendant is capable of rendering, "substantial assistance" in their identification, arrest and conviction; all in violation of Article I, Sections 2,4 and 9 of the Constitution of the State of Florida and of the Fifth and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that notwithstanding the "saving clause" contained in Section 3 of the Act (Chapter 79-1), passed as Senate Bill 83 and signed by the Governor on April 6, 1979, the other provisions of the Act cannot be given proper effect without the provision above being declared invalid and unconstitutional for the following reasons:

(1) The mere inclusion of a "saving or severability clause" in the Act is not controlling in determing the intent and purpose of the Legislature. See *State v. Lee*, 356 So.2d 276, 284 (Fla.1978).

(2) The Court has reviewed the various transcripts reflecting the legislative hisory of Section 893.135, and determines that the legislature clearly did not intend for Subsection (3) of §893.135, *Florida Statutes* (relating to relief for defendants wo provide "substantial assistance") to be severable from the portions of the Statute imposing severe mandatory minimum sentences.

(3) In addition, it was clearly the intent and purpose of the Legislature in drafting this statute that most defendants convicted thereunder would make use of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be, accordingly, applied sparingly. Therfore, once this "substantial assistance" provision is vitiated as unconstitutional, were the remainder of the statute to remain in force, the impact both physical and otherwise of the law would drastically exceed the anticiaptions of the Legislature when they passed the law.

(4) Accordingly, this Court finds:

(a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of Section

893.135. See *High Ridge Managment Corp. v. State*, 354 So.2d 377 (Fla. 1977); *Presbyterian Homes of Synod of Florida v. Wood*, 297 So.2d 556, 559 (Fla. 1974); *State ex rel. Limpus v. Newell*, 85 So.2d 124, 128 (Fla. 1956); *State v. Calhoun County*, 127 Fla. 304, 311-13, 170 So. 883, 886 (1936); and

(b) That without the provisions contained in subsection (3) being given effect, application of the statute would create a result never contemplated by the Legislature. See *State ex rel. James v. Gerrell*, 137 Fla. 324, 330, 188 So.812, 815 (1939) (on rehearing); *Hayes v. Walker*, 54 Fla. 163, 168, 44 So. 747, 749 (1907); and

(c) That the provisions of the Act contained in subsection (3) were a clear and obvious inducement to the enactment of the other provisions of §893.135, specifically, subsections (1) and (2) thereof. See *State ex rel. West v. Hilburn*, 70 Fla. 55, 61-62m 69 So. 784, 786 (1915); *Dade County v. Keys*, 141 So.2d 819,821-22 (Fla.3d DCA 1962), *cert.* discharged, 152 So.2d 171 (Fla.1963).

THEREFORE and ACCORDINGLY, Subsections (1) and (2) of §893.135, *Florida Statutes*, which creates mandatory minimum sentences for the offense of trafficking in controlled substances are declared "non-severable" from subsection (3) of §893.135, *Florida Statutes*, which provide for suspension or reduction of said sentences; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, for the foregoing reasons, the respective motions of defendants to dismiss the Informations pending against them, or certain Counts thereof, be and hereby, are granted as follows:

As to Cast Number 79-8449, Counts I and II are dismissed for all of the reasons more specifically set forth above. In light of this ruling, the Court herein specifically reserves any ruling at this time on co-defendant Kassem's supplemental motion to dismiss which deals with issues not the subject of within Order:

As to Case Number 79-9076, Count III is

dismissed;

As to Case Number 79-10646, the Information is dismissed.

DONE AND ORDERED at Miami, Dade County, Florida this 25th day of September, 1979.

[S] Jon I. Gordon
THE HONORABLE JON I. GORDON
Circuit Court Judge

Copies furnished counsel

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 79-11741

ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS COUNT II OF THE INFORMATION,
AND HOLDING SECTION 893.135,
FLORIDA STATUTES,
TO BE UNCONSTITUTIONAL

THE STATE OF FLORIDA,
Plaintiff,

v.

JERRY JACKSON,
Defendant

The defendant was charged in Count II of the Information in the above-styled cause with violating Section 893.135(1)(b)(1), Florida Statutes (1979), which proscribes the sale, manufacture, delivery, importation into the state, or possession of at least 28 grams, but less than 200 grams of cocaine. The Defendant filed a motion to dismiss that count, supported by a memorandum of law, based upon the Defendant's contention that *Fla. Stat.* §893.135, particularly section (3) of that statute, is unconstitutional. He subsequently filed an amended motion to dismiss, which raised the issue of the constitutionality of other portions of the statute. The prosecution, for its part, filed a memorandum of law, and furnished the Court and opposing counsel with copies of several cases. The Court was thus adied by research, pleadings and extensive oral argument from both parties, and therefore is fully advised of the premises. For the reasons set forth below, the motion to dismiss is granted, and Section 893.135, Florida Statutes, is held to be unconstitutional.

1. Sub-section (3) of the statute is violative of the Fifth Amendment in that it contains a penalty upon the assertion of a constitutional right, and a coercive sentencing procedure prohibited by the privilege against self-incrimination and due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, and Article I Section 9 of the Constitution of the State of Florida. Specifically, the statute prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "substantial assistance" in the investigation or prosecution of others, thus unfairly conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent, and penalizing him for the exercise of that right. To the extent that it is unconstitutional to punish with non-criminal sanctions the exercise of the Fifth Amendment, the proposition applies with greater force in the context of a criminal prosecution. *See, e.g., United States v. Jackson,* 390 U.S. 570 (1968).

One such case is particularly instructive. In *United States v. Rogers*, 504 F. 2d 1079 (5th Cir. 1974), the Court was faced with a situation strikingly similar to that created by the statute *sub judice*. In *Rogers*, the trial court had indicted its disapproval of the Defendant for not cooperating with the government in identifying his co-conspirators, and "taking the first step" towards rehabilitation. The trial judge further stated that a lesser sentence would be considered if the Defendant gave material and productive cooperation to the government. The Fifth Circuit, in vacating the Defendant's sentence, held that there was no distinction between confessing guilt and possibly implicating one own self by implicating others. Therefore, to request such assistance was as much an unconstitutional imposition upon ones right to remain silent as demanding a confession of guilt was. *Accord, United States v. Acosta*, 501 F. 2d 1330, 1337-78 (5th Cir. 1974) (dissenting opinion of Judge Gee captioned "The Sentencing Procedure") adopted en banc. 509 F. 2d 539 (5th Cir. 1975). As it was persuasively stated in *United States v. Garcia*, 544 F. 2d 681 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consideration at the bar of justice. They had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand.

The statute not before this Court seeks to compel information which naturally and necessarily is self-incriminatory, but it provides no co-extensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosectuion pending or which may be brought against the subject, buasic precepts of our accusatorial system of justice are offended. *Kastigar*

v. United States, 406 U.S. 441 (1972).

Notably, sub-section (3) contains no reference to plea bargaining or pleas whatsoever. It only operates once one is convicted and is being or has been sentenced. It exacts a waiver of the constitutional privilege against self-incrimination to enjoy any hope of reducing or suspending the mandatory minimum sentences the statute imposes. Such a penalty, however, is beyond the power of the Legislature to demand.

2. Sub-section (3) of the statute is unconstitutional in that its purported benefits are only available to Defendants who have accomplices or co-conspirators, and are capable of rendering substantial assistance. This has the effect of creating two classes of defendant s charged with the same crime, and offering a benefit to one class while arbitrarily and capriciously denying that benefit to the other. In that there is no rational basis for this type of separate treatment, the statute is violative of due process and equal protection of the laws

Further, after reviewing the transcripts of the legislative debate which preceeded enactment of this statute, the Court is convinced that the avowed purpose of this statute is to vigorously prosecute and punish those in the upper eschelons of the drug hierarchy. The Court is equally convinced, however, that sub-section (3) is an impediment to that goal. Consider: a lowly member of a drug selling enterprise, with no knowledge of the workings of that enterprise and whose sole function is to consumate sales of drugs on the street level, if charged without accomplice or co-defendant would not *be able* to provide substantial assistance even if he desired to do so. He would therefore be denied any benefits of the mitigational provision of sub-section (3). Conversely, the ringleader of such an enterprise, intimately familiar with all of the members and working of the enterprise, would be in a position to offer substantial assistance, and would thus be eligible for a lesser sentence. The Court therefore finds that sub-section (3) is not only unconstitutional, but it is improper.

3. Sub-section (3) of Section 893.135, Florida Statutes, violates the due process clause of the Article I, Section 9 of the Florida Constitution and of the Fifth and Fourteenth amendments to the United States Constitution, in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite and uncertain so that reasonable men must guess as to its meaning. Indeed, a review of the transcripts of the Legislative proceedings reflects numerous expressions of concern by the legislators themselves that the term substantial assistance was unworkably vague and uncertain.

In that the statute is totally devoid of guidelines by which to determine if "substantial assistance" has been rendered, such determination is left to the whim and caprice of the individual prosecutor and thereby violates due process of law.

4. While not necessarily of constitutional dimension, sub-section (3) suffers from another infirmity. The statute prescribes mandatory minimum sentences without parole or other mitigation unless the *state attorney* initiates a motion to reduce or suspend the sentence. This Court shares the concern of Judge Wachtler expressed in his concurring opinion in *People v. Eason*, 386 N.E 2d 673 (N.Y. 1976), a case provided to the court by the prosecution. Judge Wachtler states:

> ...I am compelled to express my concern with the prosecutor's unbridled discretion to withhold recommending probation. Regardless of a defendant's actual co-operation, under the present statute the prosecutor may arbitrarily quell the possibility of probation without review of any sort. It is my view that since the Legislature has spelled out the predicate for probationers treatment, i.e., providing material assistance, the prosecutor's determination should not be beyond the neutral eye of the judiciary. This absence of reviewability is especially enigmatic in view of the statute's explicit requirement (in virtually identical language) that in considering whether or not to

accept a recommendation the count must believe that the defendant "has or is providing material assistance." And whereas the court may benefit from the prosecutor's participation in or recommendations regarding probation, it must be remembered that the prosecutor is in an adversarial posture. Consequently, it would be far more appropriate for this type of discretion to be exercised by the court.

5. The Court finds that sub-section (3) of §893.135, *Florida Statutes* is not "severable" from the remainder of the statute, notwithstanding the "saving clause" contained in the statute. The mere includion of a "saving" or "severability clause" in the Act is not controlling in determining the intent of the Legislature. *See State ex rel. Boyd v. Green,* 355 So. 2d 789 (Fla. 1978); *State v. Lee,* 356 So. 2d 276 (Fla. 1978).

The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, and determined that the legislature clearly did not intend for Subsection (3) of §893.135 Florida Statutes (relating to relief for Defendants that provide substantial assistance) to be severable from the portions of the Statute imposing severe mandatory sentences. In addition, it was clearly the intent and purpose of the Legislature in drafting this statute that most defendants convicted thereunder would make use of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences provided by the remainder of the statute would be, accordingly, applied sparingly. Therefore, once this "substantial assistance" provision is invalidated as being unconstitutional, were the remainder of the statute to remain in force, the impact would drastically exceed the anticipations of the legislature in passing the law. Accordingly the Court specifically finds:

(a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of §893.135. See *High Ridge Management Corp. v State,* 354so. 2d 377 (Fla. 1977); *Presbyterian Homes of Synot*

of Florida v. Wood, 297 So. 2d 556, 559 (Fla. 1974); *State ex rel. Limpus v. Newell*, 85 So. 2d 124, 128 (Fla. 1956); *State v. Calhoun County*, 127 Fla. 304, 311-13, 170 So. 883, 886 (1936).

(b) That without the provisions contained in sub section (3) being given effect, application of the statute would create a result never contemplated by the legislature. *See State ex rel Boyd v. Green*, 355 So. 2d 789, 795 (Fla. 1978); *State ex rel James v. Gerrell*, 137 Fla. 324, 330, 188 So 812, 815 (1939) (on rehearing); *Hayes v. Walker*, 54 Fla. 163, 168, 44 So. 747, 749 (1907).

(c) That the provisions of the Act contained in sub section (3) were a clear and obvious inducement to the enactment of the other provisions of 893.135, specifically, sub section (1) and (2) thereof. *See State ex rel West v. Helburn*, 70 Fla. 55, 61-62 69 So. 2d 784, 786 (1915); *Dade County v. Keys*, 141 So. 2d 819, 821-22 (Fla. 3d DCA 1962), *cert discharged* 152 So. 2d 171 (Fla. 1963).

5. In light of the above rulings, it is not necessary for this Court to address all of the points raised by the defendant. The Court feels compelled, however, to address one of those points, and in so doing, the Court hereby holds that Section 893.135 (1)(b), which prohibits the sale or possession of cocaine or *any mixture containing cocaine*, is unconstitutionally overbroad, contrary to due process of law, and in addition violates the equal protection clause of the Fourteenth Amendment.

In that 893.135 (1)(b) prohibits sale or possession of a "mixture" of cocaine and innocuous cutting agents, such as manitol, milk sugar, etc., it may well be that the mixture in a given case would consist of 27.9 grams of lactose, and .1 gram of cocaine. that this result is possible is especially true when it is considered that, according to the arresting officer in thsi case, the Crime Lab makes no determination of the amount of cocaine in a given mixture. Thus, *any chemically detectable amount* of cocaine when mixed with 28 grams or more of

any innocuous substance, would fall within the purview of this statute. Clearly the Statute, particularly 893.135 (1)(b) is overbroad in that it prohibits possession of innocuous substances. See *Purifoy v. State,* 359 So. 2d 446 (Fla. 1978). Further, there is no rational basis for defining cocaine as "any mixture containing cocaine" in that it was stated that quantitative analysis can be made if requested. Thus, the inclusion of the illegal cocaine with extraneous substances not prohibited by law for the purposes of enhancement of the offense constitutes a denial of due process of law.

Finally, in that the statute provides for the identical treatment under the mandatory sentencing provisions of persons possessing 28 grams of pure cocaine and those possessing a mere scintilla of cocaine mixed with 28 grams of a cutting agent, the statute offends equal protection of the laws.

BASED upon all of the foregoing, the Court hereby grants the Defendants motion to dismiss Court II of the information, and declares Section 893.135, Florida Statutes (1979) to be unconstitutional.

DONE AND ORDERED THIS 11th day of October, 1979, at Miami, Florida.

[S] illegible
CIRCUIT COURT JUDGE

STATE OF FLORIDA
COUNTY OF DADE

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records in my office.
WITNESS MY HAND and official seal this Oct. illegible, 1979

RICHARD P. BRINKER
Clerk Circuit Court

By [S] C.Downey D.C.

ON THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 79-8211

ORDER

THE STATE OF FLORIDA,
Plaintiff
vs.
HOWARD MATTHEW BILFORD,
EDUARDO GARCELL,
GEORGE LUIS GONZALES,
FRANK VINCENT DICAMILLO,
ALBERTO ARAUJO,
LUIS CARLOS PEREZ, and
JEFFREY ELIOT HOWARD,
Defendants.

THIS matter coming on to be heard upon the Defendants' Motion to Dismiss certain Counts of the Information pending against them, and the Court having heard from the parties and being otherwise fully advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that Subsection (3) of Section 893.135, *Florida Statutes*, is declared invalid and unconstitutional for the following reasons:

1. Section 893.135 prescribes a severe mandatory minimum sentence without parole or other mitigation unless the Defendant provides "substantial assistance" in the investigation or prosecution of others, thus unfairly conditioning the grant of a substantial benefit upon the relinquishment of the Defendant's right to remain silent and penalizing him for the exercise of that Constitutional right, all in violation of the privilege against self-incrimination protected by Article I, Section

9 of the Constitution of the State of Florida and by the Fifth and Fourteenth Amendments to the United States Constitution, contrary to our accusatorial, as opposed to inquisitional, system of justice which is implicit in our traditions and organic law, denying the Defendant due process of law guaranteed by Article I, Section 9 of the Constitution of the State of Florida and by the Fourteenth Amendment to the United States Constitution. Sebsection (3) contains no reference to plea bargaining or pleas, whatsoever. It only operates once one is convicted and is being or has been, sentenced. It exacts a waiver of the Constitutional privilege against self-incrimination to enjoy any hope of reducing or suspending the mandatory minimum sentences that statute imposes. But such a penalty is beyond the power of the Legislature to demand.

This new statute seeks to compel information which naturally and necessarily is self-incriminating but it provides no coextensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosecution pending or which may be brought against the subject, basic precepts of our accusatorial system of justice are offended. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967), the Supreme Court stated:

> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. ***We now hold the protection of the individual under the Fourteenth Amendment against coerced statement prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

So stating, the Supreme Court found a waiver of immunity invalid when coerced by the threat of the loss of policemen's job.

In a companion cause to *Garrity, supra*, the Supreme Court extended the protection of the Fifth Amendment not only to the exclusion of testimony coerced by the threat of penalty in any subsequent criminal proceedings, but also to invalidating the penalty of disbarrment imposed for the assertion by a lawyer of his Fifth Amendment right not to respond to a subpoena *duces tecum. Spevak v. klein*, 385 U.S. 511, 87 S.Ct. 625 (1967), 17 L.Ed.2d 574. The Court stated, 385 U.S. at 515:

> In this context "penalty" it not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of *any sanction which makes assertion of the Fifth Amendment privilege "costly."* (Emphasis added)

Accord, Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913 20 L.Ed.2d 1082 (1968), (statute which attempted to coerce the waiver of one's privilege against self-incrimination without immunity by the penalty of loss of employment was held constitutionally invalid); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 284, 88 S.Ct. 1917, 29 L.Ed.2d 1089, (1968) (State action of giving public employees "a choice between surrendering their constitutional rights or their jobs" was unconstitutional). The Court in*Spevack*, found that disbarrment was indeed "costly", 385 U.S. at 516:

> The threat of disbarrment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as much an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him..." (citations omitted).

The Florida courts have followed this line of authority and have held that one cannot be constitutionally coerced to waive one's right against self-incrimination by threat of job loss. *See, e.g., Anson v. Department of Revenue*, 354 So. 2d 386 (Fla. DCA 1977); *Lurie V. Florida Board of Dentistry*, 288 So.2d 223 (Fal. 1973).

There is, however, a great difference between job loss or contractual promises as involved in the cases cited above, and the loss of liberty and the right to individual sentencing consideration and/or leniency involved in the case before this Court. Certianly the loss of liberty must demand as much if not more protection by the Fifth Amendment than the threat of pecuniary loss.

And so the federal courts have uniformly recognized. Where judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant at sentencing and have expressly stated that these factors will determine the sentence they impose, these sentences have been vacated as unconstitutionally coercive, upon the same rationale as those cases cited above. *See, Thomas v. United States* 368 F.2d 941 (5th Cir. 1966); *United States v. Rodriquez*, 498 F.2d 302 (5th Cir. 1974); *United States v. Yurasovich*, 580 F.2d 1212 (3d Cir. 1978); *United States v. Rogers*, 504 F2d 1079 (5th Cir. 1974). As it was persuasively stated in *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consideration at the bar of justice. They had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand.

Contrary to this well-settled body of law, under subsection (3), the Florida Legislature mandates this unconstitutional, coercive method of obtaining evidence.

2. Section 893.135 essentially enacts a new offense of failing to inform against fellow citizens and other persons, all in violation of the rights set forth in Paragraph 1 above and contrary to basic precepts of a free society.

3. Section 893.135 prescribes a severe mandatory minimum sentence without parole or other mitigation unless the defendant cooperates to the satisfaction of the

state attorney and/or the sentencing judge and, therefore, inherently and necessarily infringes upon the defendant's basic constitutional right to have the accusations against him proved by the State to the satisfaction of a jury, all in violation of the basic rights of the accused guaranteed by Article I, Section 2, 9, 16, 17, 21, and 22, of the Constitution of the State of Florida and of the Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

4. Subsection (3) of Section 893.135, *Florida Statutes*, violates the due process clause of Article I, Section 9, of the Constitution of the State of Florida and the Fifth Amendment of the Constitution of the United States in that the term "substantial assistance" used therein is unconstitutionally vague, indefinite, and uncertain. Indeed, a review of the transcripts of the Legislative proceedings (both in Committee and on the floor) incident to passage of this Act reflect numerous occasions when the legislators themselves expressed concern that the term "substantial assistance" was unworkably vague and uncertain.

5. Subsection (3) of Section 893.135, *Florida Statutes*, prescribes mandatory minimum sentences without parole or other mitigation unless the state attorney initiates a motion to reduce or suspend the sentence thereby violating basic constitutional principles of division and separation of Executive, Legislative and Judicial powers and responsibilities, and Specifically:

A. Effects an unwarranted encroachment into the judicial sentencing function by delegating to the Executive branch (i.e., State Attorney's Office) the ultimate sentencing function which Constitutionally must vest exclusively in the Judicial branch; and

B. Invades the Court's inherent rule-making powers by purporting to prescribe who may petition the Court and under what circumstances.

All of the above being contrary to the guaranty of a Republican form of government, as decreed by Article II, Section 3 and Article V, Section 1 of the Constitution of the State of Florida.

6. Section 893.135, *Florida Statutes,* is an unconstitutionally vague, indefinite, uncertain, overbroad, and arbitrary statute in that the provisions thereof condition liberty upon the following terms:

(a) That the state attorney "may" move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion; and

(b) That the state attorney's motion be made only in connection with a Defendant who provides "substantial assistance" in the investigation and prosecution of others; and

(c) That the benefits are available only to Defendants who have accomplices, accessories, co-conspirators or principals in the crime and only when the state attorney requires, and the Defendant is capable of rendering, "substantial assistance" in their identification, arrest and conviction; all in violation of Article I, Sections 2, 4, and 9 of the Constitution of the State of Florida and of the Fifth and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that notwithstanding the "saving clause" contained in Section 3 of the Act (Chapter 79-1), passed as Senate Bill 83 and signed by the Governor on April 6, 1979 without the provision above declared invalid and unconstitutional, the other provisions of the Act cannot be given proper effect for the following reasons:

(1) The mere inclusion of a "saving or severability clause" in the Act is not controlling in determining the intent and purpose of the Legislature. *See State v. Lee,* 356 So. 2d 276, 284 (fla. 1978).

(2) The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, and determines that the legislature clearly did not intend for Subsection (3) of §893.135, *Florida Statutes,* (relating to relief for defendants who provide "substantial assistance") to be severable from the portions of the Statute imposing severe mandatory minimum sentences.

(3) In addition, it was clearly the intent and purpose of

the Legislature in drafting this statute that most defendants convicted thereunder would make use of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be, accordingly, applied sparingly. Therefore, once this "substantial assistance" provision is vitiated as unconstitutional, were the remainder of the statutes to remain in force, the impact both physical and otherwise of the law would drastically exceed the anticipations of the Legislature when they passed the law.

(4) Accordingly, this Court finds:

(a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of Section 893.135. *See High Ridge Management Corp. v. State,* 354 So. 2d. 377 (Fla. 1977); *Presbyterian Homes of Synod of Florida v. Wood,* 297 So. 2d 556, 559 (Fla. 1974); *State ex. rel. Limus v. Newell,* 85 So. 2d 124, 128 (Fla. 1956); *State v. Calhoun County,* 127 Fla. 304, 311-13, 170 So. 883, 886 (1936); and

(b) That without the provisions contained in subsection (3) being given effect, application of the statute would create a result never contemplated by the Legislature. *See State ex. rel. James v. Garrell,* 137 Fla. 324, 330, 188 So. 812, 815 (1939) (on rehearing); *Hayes v. Walker,* 54 Fla. 163, 168, 44 So. 747, 749 (1907); and

(c) That the provisions of the Act contained in subsection (3) were a clear and obvious inducement to the enactment of the other provisions of §893.135, specifically, subsections (1) and (2) thereof. *See State ex. rel. West v. Hilburn,* 70 Fla. 55, 61-62, 69 So. 784, 786 (1915); *Dade County v. Keys,* 141 So. 2d 819, 821-22 (Fla. 3d DCA 1962), *cert.* discharged, 152 So. 2d 171 (Fla. 1963).

THEREFORE and ACCORDINGLY, Subsection (1) and (2) of §893.135, *Florida Statutes,* which creates mandatory minimum sentences for the offense of trafficking in controlled substances are declared "non-severable" from subsection (3) of §893.135, *Florida Statutes,* which provide for suspension or

reduction of said sentences; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, for the foregoing reasons, the respective motions of defendants to dismiss certain Counts of the Information pending against them, be and hereby, are granted as follows:

As to Case No 79-8211, Counts I and II are dismissed.

DONE AND ORDERED at Miami, Dade County, Florida this _____ day of October, 1979.

HONORABLE JOHN A. TANKSLEY
Circuit Court Judge

Copies furnished all counsel

IN THE CIRCUIT COURT IN AND FOR
ESCAMIBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

JIM WALL, III,

WILLIAM GREGORY WALL and

DANNY RUSSELL,

Defendants.

CASE NO. 79-1839

ORDER DECLARING STATUTE UNCONSTITUTIONAL

THIS MATTER coming on to be heard upon the Defendants' Motion to dismiss Count I of the Information, the Court having heard from the parties and being otherwise fully advised in the premises, it is ORDERED, ADJUDGED AND DECREED that

Section 893.135(3). Florida Statutes, is declared invalid and unconstitutional for the following reasons:

1. Said subsection violates the due process clause of Article I, Section 9, of the Constitution of the State of Florida, and the Fifth Amendment of the Constitution of the United States in that the language used therein is unconstitutionally vague, indefinite and uncertain, to-wit:

A. The Statute provides that the state attorney "may" move the sentencing court to reduce or suspend sentence without any standards or guidelines for the exercise of such discretion;

B. The state attorney's motion must be made only in conjunction with the defendant who provides "substantial assistance" in the investigation and prosecution of others.

2. According to the above-referenced subsection, the possibility of mitigation of the minimum, mandatory sentencing provisions are availabe only to defendants who have accomplices, accessories, co-conspirators or principals in the crime and only when the state attorney requires, and the defendant is capable of rendering "substantial assistance" in their identification arrest and conviction, all in violation of Article I, Section 2, 4 and 9, of the Constitution of the State of Florida and the Fifth and Fourteenth Amendment of the Constitution of the United States.

3. Subsection (3) of 893.135, Florida Statutes, provides mandatory, minimum sentence without parole or other mitigation unless the state attorney initiates a motion to reduce or suspend a sentence. Said provision violates basic constitutional principles of division and separation of the executive, legislative and judicial powers and responsibilities and effects an unwarranted encroachment into the judicial sentencing function by delegatin to the executive branch (the state attorney's office) the ultimate sentencing function which constitutionally must vest exclusively in the judicial branch. It further invades the court's inherent rule-making powers by purporting to prescribe who may petition the court and under what

circumstances. Subsection (3) of 893.135, Florida Statutes, is, therefore, contrary to the guaranty of a republican form of government as decreed by Article II, Section 3, and Article V, Section 1, of the Constitution of the State of Florida.

4. Section 893.135(1)(b), Florida Statutes, prohibits sale or possession of a "mixture" of cocaine when combined with any other agent or substance regardless of the total amount of actual cocaine. Any chemically detectable amount of cocaine, when mixed with 28 grams or more of any substance, would fall within the purview of this Statute. There is not legislative history indicating nor has the court found any rational basis for defining cocaine as "any mixture containing cocaine" in that it was agreed by the state and the defendant that a quantative analysis can be made to determine the actual amount of cocaine present in combination with any other substance. The Statute, thus, provides the identical treatment under the mandatory sentencing provision of persons possessing 28 grams of pure cocaine and those possessing a mere scintilla of cocaine mixed with 28 grams of any other substance. For this reason, the Statute offends the equal protection and due process clauses of the Constitutions of the United States and the State of Florida.

5. The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, Florida Statutes, and has determined that the legislature clearly did not intend for subsection (3) of Section 893.135, Florida Statutes, relating to relief for defendants that provide "substantial assistance" to be severable from the portions of the Statute imposing severe mandatory sentences. It is clear that the legislature intended for defendants convicted thereunder to seek the "substantial assistance" provision avoiding mandatory incarceration. If the "substantial assistance" provision is invalidated as being unconstitutional, the impact requiring every single defendant to be incarcerated for a mandatory, minimum of fifteen years would greatly exceed the anticipation of

the legislature in passing a law. Accordingly, the Court finds that:

A. The Statute as a whole would not have been enacted without the inclusion of subsection (3);

B. Without the provisions contained in subsection (3), application of the Statute could create a result never contemplated by the legislature;

C. The provision of the act contained in subsection (3) was a clear and obvious inducement to the enactment of the other provisions of Section 893.135, Florida Statutes, specifically subsection (1) and (2) thereof.

6. The Court, therefore, finds that subsection (3) is n not severable and that the unconstitutionality of that subsection invades and renders the entire Statute unconstitutional. Based upon all of the foregoing, the Court hereby grants the Defendants Motion to dismiss Court I of the Information and declares Section 893.135, Florida Statutes (1979), to be unconstitutional.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida, this 14th day of December, 1979.

[S] William Frye, III
Circuit Judge

Copies to:

Barry Z. Rhodes, Esquire
Assistant State Attorney

Robert G. Kerrigan, Esquire
Attorney for Defendant

IN THE CIRCUIT COURT OF THE 17th
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA.

CASE NO. 79-3859CF
JUDGE: MOE

BOOK 347 PAGE 2095
ORDER

STATE OF FLORIDA

Plaintiff

VS.

JUDY LYNN REYNOLDS and SUSAN K. WELTY

Defendants.

THIS CAUSE having come on to be heard upon the Defendants' Motions to Dismiss the Information pending against them, and the Court having heard argument of counsel and being otherwise fully advised in the premises thereof, it is hereby

ORDERED AND ADJUDGED that subsection (3) of §893.135, Fla. Statutes, is declared invalid and unconstitutional for the following reason:

1. §893.135 imposes stiff mandatory fines and harsh mandatory minimum sentences without parole or other mitigation for trafficking in controlled substances. However, if a defendant convicted under this Statute provides "substantial assistance" in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals, he "may" receive a reduced or suspended sentence.

This Court holds that the use of the term "substantial assistance" in Subsection (3) of §893.135, Fla. Statutes, renders the statute violative of the due process clause of Article I, Section 9, of the Florida Constitution and the Fifth Amendment of the United States Constitution. The term is vague and indefinite. Nowhere in §893.135 is the

term "substantial assistance" defined. Morever, a review of the legislative transcripts of the hearings and proceedings which took place prior to the passage of the statute demonstrates that a number of legislators had a serious concern as to the workability of the term "substantial assistance".

2. Subsection (3) of §893.135, Fla. Statutes, is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. Under this Statute, a convicted person may receive a reduced or suspended sentence *if* he provides "substantial assistance" in the investigation and prosecution of others, and then only *if* the State Attorney moves the sentencing court to reduce or suspend the sentence. However, the obvious problem with this statute is that a person convicted under it may very well be not able to furnish *any* assistance, let alone *substantial* assistance, in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. Thus, subsection (3) clearly discriminates against a defendant who simply cannot provide substantial assistance to law enforcement authorities. In essence, if a defendant has someone to "squeal" on, this person can receive a reduced or suspended sentence. However, on the other hand, if a defendant simply does not have anyone to "squeal" on, he cannot receive a reduced or suspended sentence. Consequently, in light of this realistic possibility, if not probability, this Court holds that subsection (3) of §893.135, Fla. Statutes, violates an accused's constitutional right to be equally protected under the law.

3. Subsection (3) of §893.135, Fla. Statutes, is violative of the separation of powers doctrine contained in Article II, Section 3, of the Florida Constitution in that it invests the State Attorney, as part of the Executive Branch, with unbridled and unfettered discretion so as to encroach upon the judicial sentencing function. Under Subsection (3), the decision as to whether or not to move the sentencing court for a reduction or suspension of sentence is left entirely in the descretion of the State Attorney. Only the State Attorney may move the sentencing court for a reduction or suspension of

sentence after, in the State Attorney's subjective opinion, a convicted defendant has provided substantial assistance in the criminal investigation of others. Until such time, the sentencing court has absolutely no power to reduce or suspend a defendant's sentence. Such legislative delegation of authority to the State Attorney's Office and encroachment of the judicial branch is improper. *Thomas v. State*, 342 So.2d 52, 55 (Fla. 1977).

Subsection (3) of §893.135, Fla. Statues, effectively permits the State Attorney to control the sentence of a defendant and to determine what punishment is proper for the defendant. However, the determination of penalties to be imposed is not an executive function, but rather a legislative one. *Hamilton v. State*, 366 So.2d 8, 11 (Fla. 1978). This Court adopts rulings from other jurisdictions which hold that a statute that permits the prosecutor to have control over the sentence imposed is unconstitutional. *Spalding v. State*, 330 NE 2d 774, 777 (Ind. App. 1975); *People v. Superior Court*, 130 Cal. Rptr.548(Cal. App. 1976); *People v. Fredricks*, 362 NY Supp. 2d 92 (1974).

4. Subsection (3) of §893.135, Fla. Statutes, is violative of the privilege against self-incrimination guaranteed every person by Article I, Section 9 of the Florida Constitution, as well as the Fifth and Fourteenth Amendments to the United States Constitution. The effect of Subsection (3) is to coerce a convicted defendant into disclosing information in order to receive a reduced or suspended sentence. In essence, it requires the defendant to "squeal" on others involved in drug activities in order to escape mandatory minimum sentences and stiff fines. This effect is constitutionally impermissible.

In *United States v. Rogers*, 504 F.2d 1079, 1085 (5th Cir. 1974), cert. denied, 422 U.S. 1042, the trial court sentence was vacated because of this type of coercion. The Fifth Circuit Court of Appeals stated:

> "at the time of the sentence, the Court clearly indicated its distaste for Rogers' lack of cooperation in identifying his confederates, especially in the face of the jury's findings that a conspiracy existed. It gave Rogers to understand

that the first steps towards rehabilitation, in its opinion was to cooperate with authorities in bringing others involved in a conspiracy to justice and unless and until Rogers indicated substantial, material, productive cooperation, the Court would not consider a lesser sentence.

* * * *

When it has been made to appear that longer sentences have been imposed by the Courts because defendants refused to confess their guilt and persisted in their claims of innocence, we have vacated their sentences. (Citations omitted.) Until now, we have had no occassion to address ourselves to the situation *sub judice*, where the trial court did not ask Rogers to directly confess his guilt, but rather to "sing" about others involved in the conspiracy. But we view this as a distinction without a difference."

It is well-established law that it is improper for a penalty to be imposed on the basis that the defendant did not "come clean" or otherwise cooperate with government officials. See *U.S. v. Adams*, 555 F.2d 353 (3rd Cir. 1977); *U.S. v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974); *U.S. v. Laca*, 499 F.2d 922 (5th Cir. 1975). In *Rodriguez*, supra, the Fifth Circuit Court of Appeals held that a defendant retains important Fifth Amendment rights even *after* a jury verdict, and that a defendant therefore cannot be constitutionally placed in the position of either abandoning those rights or risking a harsher sentence. See also *U.S. v. Yurasovich*, 580 F.2d 1212 (3rd Cir. 1978).

Thus, to require a defendant to "come clean" effectively penalized him for exercising his constitutional right to remain silent. *U.S. v. Wright*, 533 F.2d 214 (5th Cir. 1976). In *U.S. v. Garcia*, 544 F.2d 681, 685 (3rd Cir. 1976), the Third Circuit Court of Appeals stated that "the quality of mercy is strained when its price is abandonment of the classic freedom against self incrimination." In the *Garcia* case, the trial court placed improper weight on the defendant's requirement to

reveal to the authorities his source of supply of cocaine in order to obtain leniency from the court when imposing its sentence. The Third Circuit Court of Appeals said at 685:

> "The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice; they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentences to stand."

This Court holds that the "price tag" set forth in Subsection (3) of §893.135, Fla. Statutes, is likewise too high since it requires a defendant to forsake his constitutional privilege against self-incrimination in order to receive less then the mandatory minimum sentence. Therefore, Subsection (3) of the aforementioned statute is hereby declared invalid and unconstitutional.

IT IS FURTHER ORDERED AND ADJUDGED that notwithstanding the "severability clause" contained in Section 3 of the Act (Chapter 79-1) which created §893.135, Fla. Statutes, Subsections (1) and (2) of §893.135, Fla. Statutes, cannot stand without Subsection (3). Thus, Subsections (1) and (2) of §893.135 Fla. Statutes, are hereby also declared invalid and unconstitutional for the following reasons:

The test for severability was set forth by the Florida Supreme Court in *Cramp v. Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962) as follows:

> "When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: 1) the unconstitutional provisions can be separated from the remaining valid provisions, 2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, 3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and 4) an act complete in itself remains after

the invalid provisions are sticken...137 So.2d at 830."

Moreover, in discussing the various tests for severability, Chief Justice England, in *State v. Lee*, 356 So.2d 276, 284 (Fla. 1978), stated, "The touchstone for severability under each of these formulations...is the 'intent' of the legislature with respect to the enactment as a whole."

2. Having reviewed the various transcripts of the legislative hearings and proceedings incident to the passage of §893.135, Fla. Statutes, this Court finds that the second and third prongs of the test set forth in the *Cramp* case, supra, cannot be satisfied, not the Lesiglature's intent accomplished by severing Subsection (3) of §893.135, Fla. Statutes. A careful review of the legislative history of §893.135, Fla. Statutes, clearly demonstrates that the Legislature's intent in passing this act was to apprehend the "higher echelon" drug figures by forcing the "lower echelon" drug figures to disclose information about such higher drug figures. However, without the inclusion of Subsection (3) in the statute, this legislative intent to apprehend the higher echelon drug figures is clearly defeated. Moreover, it is quite apparent that Subsection (3) of §893.135, Fla. Statutes, was an inducement to the enactment of the harsh mandatory minimum sentences provided for in Subsections (1) and (2) of the statute.

3. Severability clauses have been so commonplace that their significance should be considered minimal. See *Kapaun v. Federal Land Bank of Omaha*, 64 S.D 635, 269 NW 564 (1936); See also *State v. Lee*, 356 So.2d 276, 284, n. 3 (1978).

THEREFORE AND ACCORDINGLY, it is hereby declared that Subsections (1) and (2) of §893.135, Fla. Statutes, are nonseverable from Subsection (3) of §893.135. Consequently, §893.135, Fla. Statutes, is hereby declared unconstitutional in its entirety.

IT IS FURTHER ORDERED AND ADJUDGED that, for the foregoing reasons, the Defendants' Motions to Dismiss the Informations pending against them, be and the same, are hereby granted.

DONE AND ORDERED at Fort Lauderdale, Broward

County, Florida this 8th day of October, 1979.

/S/ Illegible H. Moe
CIRCUIT COURT JUDGE

Copies Furnished:
EDWARD M. KAY, ESQ.
STATE ATTORNEY'S OFFICE

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record
12th day October 1979
and recorded MINUTES CIRCUIT COURT
NUNC PRO TUNC: 10-8-79
347 page 2095-2101 Record Verified.
ROBERT E. LOCKWOOD, Clerk
By /S/ B. Jones D.C.

IN THE CIRCUIT COURT, THIRD
JUDICIAL CIRCUIT, IN AND FOR
THE COUNTY OF DIXIE

CASE NO. 79-69-CF-A-31

THE STATE OF FLORIDA

VS

RONALD LOCKE, ET AL

ORDER DENYING DEFENDANTS' MOTION
TO DISMISS COUNTS I AND II
OF THE INFORMATION

This cause having come on for consideration upon the MOTION TO DISMISS COUNTS I AND II OF THE INFORMATION filed by the Defendants LOCKE and FLAGE herein, and the Court having considered the MEMORANDUM filed on behalf of various parties, the Court otherwise been fully advised in the premises, it is, thereupon.

CONSIDERED ORDERED AND ADJUDGED that said Motions be and the same are hereby denied.

DONE AND ORDERED in Chambers this 19th day of March 1980 in Cross City, Dixie County, Florida.

/S/ L. Arthur Lawrence, Jr.
L. ARTHUR LAWRENCE, JR.
Circuit Judge

I HEREBY CERTIFY copies to: Michael Bryant, S. Gunter Tony, Public Defender's Office, Hand Land, John Doyle Thomas, and Larry G. Turner, and Robert B. Moeller this 19th day of March, 1980.

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA
vs.
JEFFREY STRICKLAND, et. al.,
Defendants.
CASE NO. 79 2618

ORDER

THIS MATTER coming on to be heard upon the defendants' respective motions for discharge and dismissal and for an order compelling discovery, the Court having heard argument of counsel and being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED as follows:

1. The defendants' motions to dismiss counts 1 and 2, are granted because the statute upon which those counts are brought is invalid and unconstitutional.

2. The defendants' motion for dismissal and discharge of counts 7, 8, and 10, are granted because of the failure of the state to provide speedy trial for the defendants.

3. The defendant, Jeff Strickland's motions to dismiss count 9 of the information is granted because that count fails to allege an offense under the law of the State of Florida.

4. The Court defers ruling on the defendants' motion to compel discovery because of the absence of counsel for some of the defendants and because of the apparent n[illegible] for an evidentiary hearing in that matter.

DONE AND ORDERED in Pensacola, Escambia County, Florida, this 19th day of February, 1980.

[S] JACK H. GREENHUT
Circuit Judge

cc:
LARRY TURNER
J. B. MURPHY
BILL RICHBOURG
JAMES WILSON
THOMAS M. BERRIGAN

IN THE CIRCUIT COURT OF THE THIRD
JUDICIAL CIRCUIT, IN AND FOR
DIXIE COUNTY, FLORIDA

CASE NO. 79-69-CF-31

CHARGES CT-1 TRAFFICKING IN CANNABIS
CT-2 TRAFFICKING IN CANNABIS,
CT-3 POSSESSION OF CANNABIS PLUS
CT-4 MANUFACTURING CANNABIS

STATE OF FLORIDA

VS

RONALD LOCKE,
Defendant.

OFFER OF NEGOTIATED PLEA

I HEREBY offer my plea of nolo contendere to the charge(s) of the lesser included offense of attempted trafficking in cannabis in an amount in excess of 100 pounds (F.S. 893.135 & 777.04).
Before offering this plea I was advised of the nature of the charge(s) against me, the offense(s) included within the charge(s), the range of allowable punishments under the charge(s), any possible defenses, circumstances in mitigation, and all other facts essential to a broad understanding of the charge(s) against me.

1. My attorney, the State Attorney, and I have negotiated my plea in this case. In return for my plea, the State Attorney has agreed to: See attached Exhibit A which is incorporated in this plea.
The only obligations I will incur are specifically: to enter my plea of nolo contendere to attempted trafficking in cannabis in an amount in excess of 100 pounds of cannabis as specified above and to abide by my agreements as show in "Exhibit A" which is incorporated in this plea.

THESE ARE THE COMPLETE TERMS OF THE AGREEMENT:

I have not been coerced, threatened, or intimidated in any way to get me to plead nolo contendere, and I received no promises except those stated above. I consider the negotiated plea to be to my advantage even though I understand that the Judge may impose any sentence upon me which he deems fit within the limits of the law.

2. I understand that by pleading guilty I give up the constitutional rights of trial by court (Judge) or jury, the right to remain silent, the right to confront the witnesses against me, the right against self incrimination, the right to be assisted by counsel, the right to compel attendance of witnesses on my behalf and the right to appeal the matters relating to the judgment.

3. Before tendering this plea of guilty my attorney and I have fully discussed all aspects of this case and he has, to my complete satisfaction, answered all my questions and fully explained the charge against me and any defenses to it. I am satisfied with the services my attorney has rendered me.

4. I have had sufficient time to consider the charge against me, the possible defenses, the advice of my attorney, the waiver of my rights upon pleading guilty, and to reflect upon the consequences of my plea. I do not need or desire more time to consider my plea, and I want to proceed with my plea at this time. I offer myself up to the Court for further inquiry into the knowingness and voluntariness of my plea and understand that I answer these questions under oath, on the record, and in the presence of counsel and that my answers may be later used against me in a prosecution for perjury.

5. I hereby ( ) waive ( ) do not waive presentence investigation in this case.

Signed this 13th day of May, 1980, at the Dixie County Courthouse, in Cross City, Florida, at 5:20 P.M.

The Defendant's offer of negotiated plea is acceptable to the State on the terms and conditions set forth above.

Dated the 13th day of May, 1980.

/S/ Ronald C. Locke
DEFENDANT

/S/ Larry G. Turner
DEFENSE COUNSEL

/S/ Robert Moeller
(ASSISTANT) STATE ATTORNEY

ORDER ON OFFER OF NEGOTIATED PLEA

It is ordered that the negotiated plea offered in this case is ( ) accepted conditionally pending presentence report: (X) accepted; ( ) rejected. A presentence investigation (X) is ( ) is not ordered returnable the notice to attorney day of , 19 .

DONE and ORDERED this 13th day of May, 1980.

/S/ L. Arthur Lawrence, Jr.
CIRCUIT JUDGE

"EXHIBIT A"

1. The State Attorney will Nolle Prosequi Counts II, III and IV.
2. I reserve my right to appeal the Court's ruling on all pre-trial motions.
3. The State will recommend to the Court that I be sentenced for 10 years.
4. I understand that this is a negotiated plea and I hereby stipulate that the plea of attempted trafficking of in excess of 100 pounds of cannabis is made as a negotiated plea in this case.
5. The State has agreed to stand moot on the issue of an appeal bond in this case.
6. In the event the Court desires to sentence me for in excess of 10 years, then I will be permitted to withdraw my plea. The Defendant hereby waives the Speedy Trail Rule.

Dated this 13th day of May, 1980.

/S/ Ronald C. Locke
Defendant

/S/ Larry G. Turner
Defense Council

/S/ Robert Moeller
Assistant State Attorney

Filed for record in the office of the Clerk of the Circuit Court of the County of Dixie, State of Florida, on the 14th day of May A.D. 1980 at o'clock M. Recorded in CCM book 11 on page 499-500 record verified.

/S/ Joe Hubert Allen
Clerk Circuit Court

IN THE CIRCUIT COURT OF THE THIRD
JUDICIAL CIRCUIT, IN AND FOR
DIXIE COUNTY, FLORIDA

CASE NO. 79-69-CF-31

CHARGE(S) CT-1 Trafficking in Cannabis
CT-2 Trafficking in Cannabis,
CT-3 Possession of Cannabis plus 20,
CT-4 Manufacturing Cannabis

STATE OF FLORIDA

VS

LESLIE FLAGE,
Defendant.

OFFER OF NEGOTIATED PLEA

I HEREBY offer my plea of nolo contendere to the charge(s) of the lesser included offense of attempted trafficking in cannabis in an amount in excess of 100 pounds (F.S. 893.135 & 777.04).
Before offering this plea I was advised of the nature of the charge(s) against me, the offense(s) included within the charge(s), the range of allowable punishments under the charge(s), any possible defenses, circumstances in mitigation, and all other facts essential to a broad understanding of the charge(s) against me.

1. My attorney, the State Attorney, and I have negotiated my plea in this case. In return for my plea, the State Attorney has agreed to: See attached Exhibit A which is incorporated in this plea.
The only obligations I will incur are specifically: To enter my plea of nolo contendere to attempted trafficking in cannabis in an amount in excess of 100 pounds of cannabis as specified above and to abide by my agreements as shown in "Exhibit A" which is incorporated in this plea.

THESE ARE THE COMPLETE TERMS OF THE AGREEMENT: I have not been coerced, threatened, or intimidated in any way to get me to plead nolo contendere, and I received no promises except those stated above. I consider the negotiated plea to be to my advantage even though I understand that the Judge may impose any sentence upon me which he deems fit within the limits of the law.

2. I understand that by pleading guilty I give up the constitutional rights of trial by court (Judge) or jury, the right to remain silent, the right to confront the witnesses against me, the right against self incrimination, the right to be assisted by counsel, the right to compel attendance of witnesses on my behalf and the right to appeal the matters relating to the judgment.

3. Before tendering this plea of guilty my attorney and I have fully discussed all aspects of this case and he has, to my complete satisfaction, answered all my questions and fully explained the charge against me and any defenses to it. I am satisfied with the services my attorney has rendered me.

4. I have had sufficient time to consider the charge against me, the possible defenses, the advice of my attorney, the waiver of my rights upon pleading guilty, and to reflect upon the consequences of my plea. I do not need or desire more time to consider my plea, and I want to proceed with my plea at this time. I offer myself up to the Court for further inquiry into the knowingness and voluntariness of my plea and understand that I answer these questions under oath, on the record, and in the presence of counsel and that my answers may be later used against me in a prosecution for perjury.

5. I hereby () waive (XX) do not waive presentence investigation in this case.

SIGNED this 13th day of May, 1980, at the Dixie County Courthouse, in Cross City, Florida, at 5:20, P.M.

The Defendant's offer of negotiated plea is acceptable to the State on the Terms and Conditions set forth above.

/S/ Leslie Flage
DEFENDANT

/S/ Michael L. Bryant
DEFENSE COUNSEL

/S/Robert Moeller
ASSISTANT STATE ATTORNEY

ORDER ON OFFER OF NEGOTIATED PLEA

It is ordered that the negotiated plea offered in this case is () accepted conditionally pending presentence report: (X) accepted; () rejected. A presentence investigation (X) is () is not ordered returnable the on notice to Attorney day of , 19 .

DONE and ORDERED the 13th day of May, 1980.

CIRCUIT JUDGE /S/ L. Auther Lawrence, Jr.

Court Reporter:
Nancy Tierney
204 W. Univ. Ave.
Gainesville, Fla.

"EXHIBIT A"

1. The State Attorney will Nolle Prosequi Counts II, III and IV.

2. I reserve my right to appeal the Court's ruling on all pre-trial motions.

3. The State will recommend to the Court that I be sentenced for 8 years.

4. I understand that this is a negotiated plea and I hereby stipulate that the plea of attempted trafficking of in excess of 100 pounds of cannabis is made as a negotiated plea in this case.

5. The State has agreed to stand moot on the issue of an appeal bond in this case.

6. In the event the Court desires to sentence me for in excess of 8 years, than I will be permitted to withdraw my plea. The Defendant hereby waives the Speedy Trial Rule.

DATED this 13th day of May, 1980.

/S/ Leslie Flage
DEFENDANT

/S/ Robert Moeller
ASSISTANT STATE ATTORNEY

/S/ Michael L. Bryant
DEFENSE COUNSEL

Filed for Record in the office of the Clerk of the Circuit Court of the County of Dixie, State of Florida, on the 14th day of May A.D. 1980 at o'clock M. Recorded in CCM book 11 on page 501-502; record verified.

Joe Hubert Allen
CLERK CIRCUIT COURT

By /S/ Judy Marsen
D.C.

IN THE CIRCUIT COURT,
DIXIE COUNTY, FLORIDA
FALL TERM 1980

CASE NO. 79-69-CF-31

STATE OF FLORIDA

VS

RONALD LOCKE
Defendant.

JUDGMENT AND SENTENCE

The Defendant RONALD LOCKE being personally before this Court, represented by Larry G. Turner his attorney of record, having Attempted Trafficking in Cannabis in an Amount in Excess of 100 Pounds and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant RONALD LOCKE is hereby adjudicated guilty of the crime of Attempted Trafficking in Cannabis in an Amount in Excess of 100 Pounds.

It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of Ten (10) Years in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at ** type institution.)

It is further ordered that you shall be allowed One (1) Day credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already

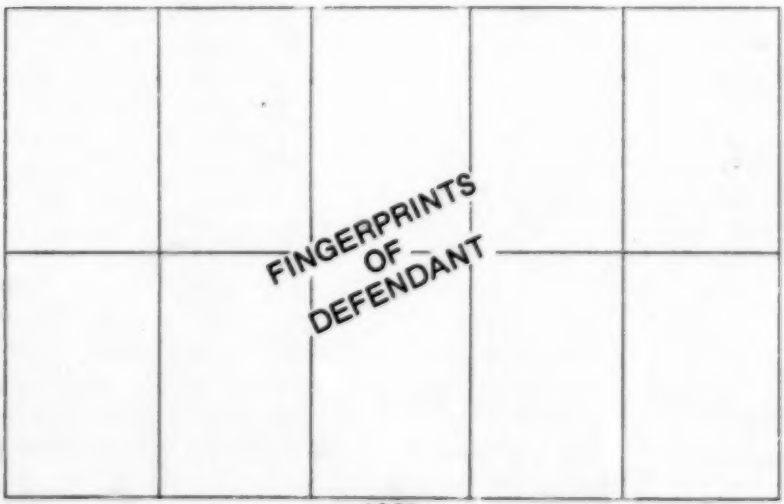
under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent) (consecutive) with the sentence imposed for the crime of ** in Case , County, No. . (Strike if not applicable.)

It is further ordered that the sheriff of Dixie County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statues.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

The following are the fingerprints of the above-named Defendant RONALD LOCKE



DONE AND ORDERED IN Open Court at Dixie County, Florida, this 18th day of September, A.D. 1980.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of Defendant and that they were placed thereon by said Defendant in my presence in Open Court this date.

/S/ L. Arthur Lawrence, Jr.
Judge

IN THE CIRCUIT COURT,
DIXIE COUNTY, FLORIDA
FALL TERM 1980
CASE NO. 79-69-CF-31

STATE OF FLORIDA

vs.

LESLIE FLAGE
Defendant

JUDGMENT AND SENTENCE

The Defendant LESLIE FLAGE being personally before this Court, represented by MICHAEL L. BRYANT his attorney of record,

having entered a plea of Nolo Contendere to the crime of

ATTEMPTED TRAFFICKING IN CANNABIS IN AN AMOUNT IN EXCESS OF 100 POUNDS and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant LESLIE FLAGE is hereby adjudicated guilty of the crime of ATTEMPTED TRAFFICKING IN CANNABIS IN AN AMOUNT IN EXCESS OF 100 POUNDS.
It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of EIGHT (8) YEARS in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at *** type institution.)
It is further ordered that you shall be allowed ONE (1) DAY credit for such time as you have been incarcerated

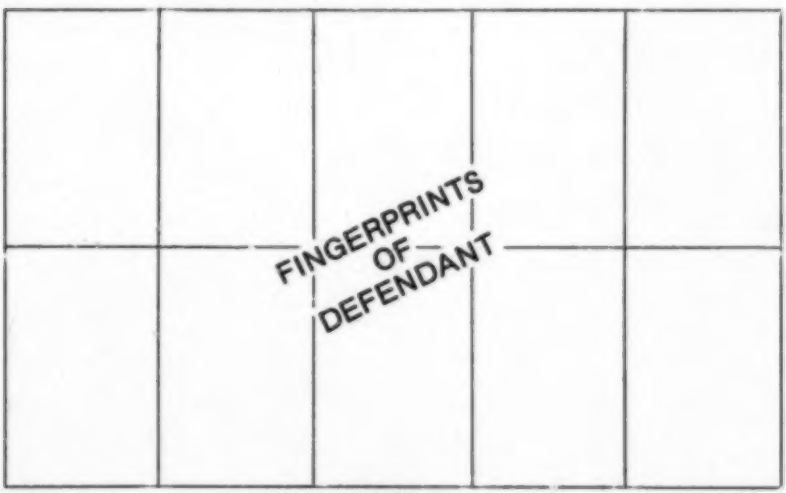
prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent) (consecutive) with the sentence imposed for the crime of ** in Case , County, No. (Strike if not applicable.)

It is further ordered that the sheriff of Dixie County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

The following are the fingerprints of the above-named Defendant, LESLIE FLAGE



DONE AND ORDERED IN Open Court at Dixie County, Florida, this 18th day of September, A.D. 1980.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, LESLIE FLAGE, and that they were placed thereon by said Defendant in my presence in Open Court this date.

/S/ L. Arthur Lawrence Jr.
Judge

Filed for Record in the office of the Clerk of the Circuit Court of the County of Dixie. State of Florida, on the 18th day of September A.D. 1980 at o'clock M. Recorded in CCM book 11 on page 637-638; record verified.

Joe Hubert Allen
CLERK CIRCUIT COURT
By /S/ JUDY Marsen
D.C.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

CASE NO.: XX-449
YY-31

AN APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR DIXIE COUNTY, FLORIDA

RONALD C. LOCKE, and
LESLIE L. FLAGE,

Appellants

vs.

STATE OF FLORIDA

Appellee

BRIEF FOR APPELLANTS

LARRY G. TURNER, ESQUIRE
THOMAS W. KURRUS, ESQUIRE
Post Office Box 508
Gainesville, Florida 32602
Attorneys for Appellant LOCKE

MICHAEL L. BRYANT, ESQUIRE
JACK M. ROSS, ESQUIRE
Post Office Drawer 1168
Gainesville, Florida 32602
Attorneys for Appellant FLAGE

I. STATEMENT OF THE CASE

On October 26, 1979, Appellants, RONALD C. LOCKE and LESLIE FLAGE, were taken into custody. By an Information filed on November 6, 1979, they were charged with four counts of possession and manufacture of marijuana: Count I charged possession of more than 10,000 pounds of cannabis; Count II, possession of between 100 and 2,000 pounds of cannabis; Count III, possession of more than 20 grams of cannabis; and Count IV, unlawful manufacture of cannabis. [L.R., 1-2]. On January 30, 1980, Appellants filed Motions to Dismiss Counts I and II of the Information on the grounds that the statute upon which those charges were based, *Fla. Stat.* §893.135, was unconstitutional. [L.R., 26-31]. These motions were denied on March 19, 1980. [L.R., 178].

* * *

On May 13, 1980, the Appellants entered an offer of negotiated plea by which they pled *nolo contendere* to the lesser included offense of attempted trafficking in cannabis in an amount in excess of 100 pounds in violation of *Fla. Stat.* §893.135 and 777.04. The plea was accepted on that same day. By this plea both Appellants reserved their rights to appeal the Court's ruling on all pretrial motions. [L.R., 410, 411]. On September 18, 1980, Appellants were adjudged guilty and sentenced, [L.R., 451, 452], and on that same date, they filed timely Notices of Appeal. [L.R., 466]. By action of this Court, the cases were consolidated for appeal on December 16, 1980.

* * * *

ISSUE IV: THE STATUTE UNDER WHICH APPELLANTS WERE CHARGED IN COUNTS I AND II OF THE INFORMATION, *FLA. STAT.* §893.135, VIOLATES THE CONSTITUTION OF THE STATE OF FLORIDA AND OF THE UNITED STATES.

Appellants filed Motions to Dismiss Counts I and II of the Information, pointing out the unconstitutionality of the statute on which those charges are based. *Fla. Stat.* §893.135. [L.R., 26-31]. An identical challenge to the validity of this statute is presently pending before the Florida Supreme Court, *State v. Benitez,* nos. 79-8449, 79-9076, 79-10646 (Fla. 11th Cir. Ct., Sept. 25, 1979), (filed in the Florida Supreme Court on October 8, 1979, with oral argument made on June 6, 1980; Fla. S. Ct. Case #57834). Appellants fully briefed these points and the memorandum is contained in the record below [L.R., 32-134]. Therefore, the arguments contained in that memorandum are hereby adopted for the purpose of this appeal.

Six circuit judges, and perhaps more, have agreed with Appellants' position and have held the statute unconstitutional. *State v. Wall*, no. 79-1839 (Fla. Escambia Cty. Cir. Ct., Dec. 14, 1979); *State v. Jackson*, no. 79-11741 (Fla. 11th Cir. Ct., Oct. 11, 1979); *State v. Bilford*, no. 79-8211 (Fla. 11th Cir. Ct., Oct. 5, 1979); *State v. Reynolds,* no. 79-3859-CF (Fla. 17th Cir. Ct., Oct. 8, 1979); *State v. Newman*, no. 79-9016, 79-11806-A, 79-10158-A & B (Fla. 11th Cir. Ct., Oct. 1, 1979); *State v. Crevas,* no. 79-8449, 79-9076, 79-10646 (Fla. 11th Cir. Ct., Sept. 25, 1979). In each of these cases the Court determined that, not only were sections of the statute unconstitutional, but also those portions were non-serverable from the remainder of the act; and thus, declared the entire statute unconstitutional.

* * * *

CONCLUSION

In conclusion, for the reasons urged in the body of this brief, the Appellants, RONALD LOCKE and LESLIE FLAGE, request this Court to enter its order:

* * *

(4) Finding the statute under which Appellants were charged in Counts I and II of the Information, Florida Statute §893.135, violates the Constitutions of the State of Florida and of the United States of America; reversing the order of the trial court denying the MOTION TO DISMISS filed by the Appellants herein, ...

* * * *

Respectfully submitted,

LARRY G. TURNER
THOMAS W. KURRUS
Law office of Larry Turner
204 W. University Ave.
Suite 6
P.O. Box 508
Gainesville, Florida 32602
Attorneys for Appellant LOCKE

MICHAEL L. BRYANT
JACK M. ROSS
Birr, Bryant & Saier, P.A.
204 W. University Ave.
Suite 4
P.O. Drawer 1168
Gainesville, Florida 32602
Attorneys for Appellant FLAGE

I HEREBY CERTIFY copy hereof has been furnished by mail to Robert Moeller, Esquire, Assistant State Attorney, P.O. Box 1147, Cross City, Florida, 32628, and the Attorney General, The Capitol, Tallahassee, Florida, 32304, this 6th day of January, 1981.

BY: /S/ Tom Kurrus for
LARRY G. TURNER, ESQUIRE
Attorney for Appellant LOCKE

BY:/S/ Michael L. Bryant
MICHAEL L. BRYANT, ESQUIRE
Attorney for Appellant Flage

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

RONALD C. LOCKE and
LESLIE FLAGE,

Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT, IN AND
FOR DIXIE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

GREGORY C. SMITH
ASSISTANT ATTORNEY GENERAL

TODD FOSTER
LEGAL INTERN

THE CAPITOL, 1502
TALLAHASSEE, FL 32301
(904) 488-0600

COUNSEL FOR APPELLEE

POINT IV

THE STATUTE UNDER WHICH APPELLANTS WERE CHARGED IS CONSTITUTIONAL.

This point was obviously raised by Appellants to ensure the application of the then pending *Benitez* case to the case at bar. Since the filing of Appellants' brief, the Florida Supreme Court has upheld the constitutionality of the drug trafficking statute (§ 893.135, Fla. Stat. (1979)) against each challenge urged by Appellants. *State v. Benitez*, So.2d (Fla. 1981) (Case No. 57,834, opinion filed February 12, 1981). Therefore, as Appellants' claim has been answered dispositively in contravention to his position, the State would move that the trial court's finding of § 893.135 as constitutional be affirmed.

CONCLUSION

For the reasons stated herein, the State respectfully moves that the judgment and sentence of Ronald Locke and Leslie Flage be affirmed.

Respectfully submitted:

JIM SMITH
Attorney General

BY: /S/ Gregory C. Smith
GREGORY C. SMITH
Assistant Attorney General

AND

TODD FOSTER
Legal Intern

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

CASE NO. 57-834

* * *

THE STATE OF FLORIDA,

Appellant,

versus

CARLOS M. BENITEZ and
ESPERANZA BENITEZ,

Appellees.

BRIEF OF APPELLEES

JOSEPH BEELER, ESQ.
Suite 900
28 West Flagler Street
Miami, Florida 33130

BRIAN RICHARD MCCOMB
1531 N.W. 15th Street Road
Miami, Florida 33125

Attorneys for Appellees

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PREFACE

We do not ordinarily precede our arguments with a Preface. But the State has filed both an Appendix bubbling over with inflammatory newspaper clippings and like materials never offered in the trial court and also a brief stressing that "We *should become alarmed* if the Legislature did not recognize and act against the massive and pervasive cancer eating at the fabric of society in Florida." (Brief of Appellant) (emphasis in original)

Perhaps we are hypersensitive. Nonetheless, we have always believed that the People need a dispassionate Judicial Branch the most when the State calls for alarm. *Cf. Viereck v. United States,* 318 U.S. 236, 63 S. Ct. 561, 87 L. Ed. 734 (1943). After all, "(the) judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of the rights by all branches of the Government." *Stamler v. Willis,* 415 F. 2d 1365, 1369-1370 (7th Cir. 1969), *cert. denied,* 399 U.S. 929 (1970). Therefore, we take some comfort in paraphasing what another Court said in a case involving heroin trafficking:

> We are keenly aware of the acute national problem created by the illicit traffic in narcotics, and share with the general public a detestation of that business. Nevertheless our personal revulsion at the activities sought to be . . . proscribed here does not override our sworn duty as judges to uphold and enforce the (Constitution).
>
> *United States v. Jones,* 308 F. 2d 26, 33 (2d Cir. 1962) (*en banc*)

IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 57-834

THE STATE OF FLORIDA,

Appellant,

v.

CARLOS M. BENITEZ and
ESPERANZA BENITEZ,

Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE AND FACTS

We must voice some disagreement with appellant's statements that the trial court's order "contains no findings of fact relevant to the circumstances in the case at bar." (Brief of Appellant at 2).

The trial court made specific factual findings regarding the purposes and interests the Florida Legislature sought to further by the passage of Section 893.135. In announcing his decision in open court on September 7, 1979, the Honorable Jon I. Gordon found as follows:

> With regard to the issue of severability, I have reviewed the transcripts and to me, there is no question that Section 3 cannot be thrown out without throwing out the entire statute out as well.

> Repeatedly throughout the transcript, this was a hammer to increase the sanctions to coerce an individual to plead or to cooperate. I think that it is apparent from the transcript that I have furnished, and I do believe it is the legislative intent that if Subsection 3 falls, the entire statute must fall as well. When I say "the entire statute," I am talking about Section 1 of Chapter 79-1.
> (T*44)

Judge Gordon further found:

> Two, I also believe that the Legislature has attempted to take away from the judiciary and to delegate to the executive branch of the government sentencing functions which have traditionally been within the realm of the judicial branch.
>
> This is unlike the minimum mandatory sentence that is within the gun law. This, in effect, delegates to the State Attorney the ultimate sentencing function.
>
> Furthermore, Subsection 3 of Section 1 of Chapter 79-1 purports to govern, which I believe to be rule-making powers of the Supreme Court, and that it purports to attempt to determine who may petition the court and under what circumstances. I think this is a rule-making function and not a function for the Legislature.
>
> In addition, with regard to the argument dealing with substantial assistance, I have reviewed the material involved the legislative intent and substantial assistance may in one case be a conviction of a co-conspirator and another case it may simply be in identifying a CI. I believe it is vague. (T 42-43)

* For the convenience of the Court, the Appellees have adopted the Appellant's symbols abbreviating references in this appeal. (Brief of Appellant at xiv).

These findings of fact were reiterated in the trial court's Order holding the statute unconstitutional (SR 64-73):

> (2) The Court has reviewed the various transcripts reflecting the legislative history of Section 893.135, and determines that the Legislature clearly did not intend for Subsection (3) of Section 893.135, *Florida Statutes* (relating to relief for defendents who provide "substantial assistance") to be severable from the portions of the statute imposing severe mandatory minimum sentences.
>
> (3) In addition, it was clearly the intent and purpose of the Legislature in drafting this statute that most defendants convicted thereunder would make use of the punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be, accordingly, applied assistance" provision is vitiated as unconstitutional, were the remainder of the statute to remain in force, the impact both physical and otherwise of law would drastically exceed the anticipations of the Legislature when they passed the law.
>
> (4) Accordingly, this Court finds:
>
> (a) That the statute as a whole would not have been enacted without the inclusion of subsection (3) of Section 893.135. (citing cases)
>
> (b) That without the provisions contained in subsection (3) being given effect, application of the statute would create a result never contemplated by the Legislature. (citing cases)

(c) That the provisions of the Act contained in subsection (3) were a clear and obvious inducement to the enactment of the other provisions of Section 893.135, specifically, subsections (1) and (2) therefore. (citing cases)

(SR 71-72)

Additionally, while the Appellant explains that this case was joined with two other unrelated cases for a hearing on the Motion to Dismiss (brief for Appellant at 1), it fails to state that the Appellees expressly adopted and thus incorporated in the record the motion to dismiss and supporting memorandum of law in one of those cases. (T 10) Appellees have included a copy of these pleadings in the Second Supplemental Record-On-Appeal (hereinafter designated SSR) at pp. 1-26. That motion and memorandum preceded the court's oral opinion (T 42-44) and, obviously, the motion, memorandum and oral opinion all preceded the trial court's Order declaring the trafficking statute unconstitutional (SR 64-73).

ARGUMENT

I.

SINCE THE ESCAPE VALVE OF SUBSECTION (3) IS AN INTEGRAL PART OF THE NEW TRAFFICKING LAW, SINCE THE SEVERE MANDATORY MINIMUM SENTENCES WERE ENACTED DEPENDENT UPON A BELIEF THAT MITIGATION COULD BE AFFORDED THROUGH SUBSECTION (3), AND SINCE THE LAW WOULD CAUSE UNEXPECTED IMPACT WITHOUT THAT RELIEF PROVISION, SEVERABILITY IS NOT APPROPRIATE.

A. *Introduction*

The State has infused its belief with rhetoric. We believe that any Court passing upon the trafficking statute will be interested in facts and law. The logical starting point is the legislative history so that the Court can understand the purpose of the legislation and the relationship between its three subsections.

Briefly, the Legislature, in Subsection (1), dramatically enhanced penalties for a number of already prohibited drug crimes; in Subsection (2) it made the sentences mandatory and eliminated parole and probation; and, in Subsection (3), it provided a way to avoid these mandatory sentences for those willing to cooperate with law enforcement against cohorts. The legislative purpose in passing the new, harsh mandatory penalties enacted in the trafficking statute was to coerce violators to become informers. Subsections (1) and (2) provide the pressure. Subsection (3) provides the escape valve.

Once the Court understands the purposes of the legislation, it will appreciate why the trial court herein found that Subsection (3) was integral to the legislative scheme and could not properly be severed. Indeed, the conclusion of nonseverability flows so logically from any consideration of legislative history and purpose that we placed severability analysis in our first argument point

rather than our last, where it might ordinarily be expected.

B. *History of the Trafficking Legislation*

The State would have this Court believe that the Legislature intended by Section 83 (now Section 893.135, Fla. Stat. (1979)) to enact a hard-line drug statute with two separate and unconnected purposes: a law providing for mandatory sentences for convicted offenders, and a separate and unrelated provision for mitigation of these sentences if the offender after conviction provided "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." This construction is incorrect and the State's reliance upon certain cited statements of Senators is misplaced.

Specifically, the Appellant misidentifies the active sponsor of the bill as it was actually passed. It cites to statements made by Senator Childers prior to the adoption of an amendment which entirely replaced and substantially altered his initial bill. In order to clarify the actual nature and purpose of the legislation which this Court is reviewing, we have set forth below a detailed history of its passage.

Senator Childers first introduced Section 83 in 1978 and revived it in March of 1979 (SR 2). That bill was intended as a simple and concise act which would have added Section 893.135 (1) (h), to the Florida Statutes, and provided that any person found guilty of possession of more than 100 pounds of cannabis be sentenced to and serve a mandatory minimum prison term of three years. We have included a copy of this bill in the Second Supplemental Record-on-Appeal. (SSR 44) Examination of the bill reveals that Senator Childers proposed nothing in the nature of the "substantial assistance" provision found in Subsection (3) of Section 893.135, Fla. Stat. (1979) as enacted.

When the Florida Senate Committee on Judiciary-Criminal reconsidered the bill on March 8, 1979, Senator Carlucci offered an amendment which would have increased the mandatory term from three to

five years, but this amendment was rejected (SSR 33-34)*. He then suggested an amendment which would reduce the quantity of cannabis that would trigger the mandatory sentence from 100 pounds to 50, but again the Committee refused to alter the provisions of the Bill (SSR 34-36). Senator Carlucci finally suggested that the bill should be amended to prohibit plea bargaining (SSR 37). After conversation on the merits and demerits of this proposal, the Committee concluded its discussion without taking any action on the suggestion.

This history demonstrates the Committee's reluctance to enact any mandatory minimum sentence exceeding three years.

The original bill came before the Senate for vote on April 5, 1979, in this simple form. Senator Don Childers, the sponsor of Section 83, explained its purpose (SR 2-4). Senator Spicola then offered a Committee Amendment (SR 7) striking everything in Section 83 after the enacting clause and replacing it with a bill denominated S. 620 (SR 10), which constitutes what is now Section 893.135, Fla. Stat. (1979), the drug trafficking law.

The amendment was a radical departure from the three year mandatory sentencing provision envisioned by Senator Childers. The committee amendment contained graduated mandatory minimum sentences up to more than eight times the length provided for in Senator Childers' bill and added -- for the first time -- the "substantial assistance" provision of Subsection (3).

The statements of legislative intent made during debate on this Bill by both Houses demonstrate that the legislators understood coercion of cooperation to be the function of the statute.

The opening remarks of Senator Spicola, who sponsored this amendment (S. 620), explained the reason for the new law:

* We have included the entire transcript of this proceeding in the Second Supplemental Record-on-Appeal (SSR 27-43).

> The reason for the Bill *is to make the penalty enough* that the guy that flies that plane in, that pilots that boat in and when he hears that door slam, and he knows that he is going to be there for sure from 3 to 25 years, *it's going to make it worth his while to say who was financing the operation, where he got the money from;* and I think it will contribute significantly to our drug problems -- to solving our drug problem in Florida. (Emphasis added)
>
> (SR 12-13)

Senator Spicola later reiterated the purpose of these harsh sentences, while speaking in opposition to a proposed amendment which would have preserved the length of the sentences, but would have made imposition of them discretionary:

> Then the *whole incentive, the whole object of the bill, to make him cooperate,* so we for once can move from just apprehending the mules and can move up to the thoroughbreds to apprehend the generals instead of the privates, in this state, that will not be available and *with this amendment there is no sense in passing this bill.* (emphasis added)
>
> (SR 40-41)

Similarly, Senator Steinberg characterized the bill as follows:

> *This bill says,* look we'll put you in jail mandatorily for a period of time, but *if you will help us in prosecution, we can amend that mandatory jail system. It's a way of using the law to help law enforcement.* If you take away the mandatory provision of the law, you're basically putting us back to square one in our drug enforcement. (Emphasis added)
>
> (SR 47)

The comments of Representatives of the House, in considering the House companion bill, H.R. 16, on April 6, 1979, demonstrate the same legislative intent. Representative Crawford, in introducing the bill, characterized it as follows:

> [T]*he real thrust of this thing is to try and make sure* that that person, that the State Attorney, *the prosecution has enough of a hammer over that person's head to make them talk;* the problem has been we are able to get the...the...the people...the lower echelon figures, but what we really need to get is the higher echelon figures and this is what this is aimed at. (Emphasis added)
>
> (R 60)

Representative Haber, after explaining that he was generally opposed to mandatory minimum sentences, reiterated that the sentences themselves were not what the bill sought to achieve:

> So therefore, I think the Governor has come up with a (inaudible) that I can support. Two reasons: number one, you're dealing with a crime that involves a conspiracy and *it is necessary to have testimony where one party to the conspiracy turns state's evidence,* so that you can ultimately convict the person that financed the operation. In addition to that, *I think this is not a pure mandatory minimum. It is a mandatory minimum if you are caught and convicted or enter a plea and choose not to aid and assist law enforcement.* And I think it's going to work because right now, if a pilot or a courier is arrested, what he'll do, he'll spend two to three years in Raiford, at two or three hundred thousand dollars a year, because it's profitable for him to stay in jail. If you told him it's going to be a fifteen years in Raiford without gain time, without a possibility of parole or probation, he's not going

to spend fifteen years in Raiford, he's going to turn state's evidence. So, I think because of the fact that there is a way out, *it is not a pure mandatory minimum* on one hand and number two, because it involves a crime that of necessity must be a a conspiracy, I both heartily endorse and support the concept. (Emphasis added)

(R 16)

Likewise, Representative Fontana stated: "First off, the bill is designed not to get the mule, but to get the thoroughbred." (R 29)

Miss Gibson, from the Governor's office, stated: [The bill] gives us *a new tool* . . . that didn't exist before. When the reality of this thing sets in on you for the three years to five years to ten years, and you want to cooperate, we now have a *vehicle by which you can cooperate.* (Emphasis added)

(R 47)

But Representative Martinez characterized the bill most succinctly: ". . .you are hitting the guy with a rubber hose." (R 63*).

Perhaps the most revealing evidence of the coercive tool purpose are the legislator's statements that the bill -- despite the addition of long mandatory prison sentences -- would have no fiscal impact. Representative Smith stated in support of the bill:

[i]t hurts me desperately every time I hear that people say we haven't got the funds, we haven't got the manpower, we haven't got the money to stem this ever-increasing tide.

* * *

* Representative Martinez thus criticized the bill during his unsuccessful attempt to amend the bill to including the following language:

> The Court shall conduct a hearing with respect to the reduction or suspension of the sentence and the defendant shall be entitled to be present at such hearing.

The amendment failed. (R 61).

> We must take some stand. If we haven't got the dollars to be able to totally, as an army of law enforcement, get into the fight and beat them at their own game, we ought to take some other steps which don't cost us the money. This is a totally no-fiscal-impact type of bill. . .
>
> *It doesn't cost us anything.* It's about time we standing toe to toe with these people and slugging it out. We have been made the laughingstock of the United States. We are the importers, in an indirect sense, because we don't have the ability to police our own borders, on the sea, especially, and whatever tools are available to us should be maintained. (Emphasis added)
>
> (R 49-50)

See also, Journal of the Senate, April 5, 1979, at 84 (no referral to Committee on Ways and Means for fiscal impact review).

This history of the bill and the statements of legislative intent are in accord with the findings of fact made by the trial court. (See T 42-44 and SR 71-72). These findings upon appellate review come clothed with the presumption of correctness and should not be overturned unless clearly erroneous. *Heard v. Mathis*, 344 So. 2d 651, 654-55 (Fla. 1st DCA 1977); *Beavers v. Conner*, 289 So. 2d 462 (Fla. 3d DCA) *cert. denied*, 300 So. 2d 265 (Fla. 1974); *Harbor Yacht Repair, Inc. v. Sanger*, 279 So. 2d 64 (Fla. 3d DCA 1973); *Cic Leasing Corp. v. Dade Linen & Furniture Co.*, 279 So. 2d 73 (Fla. 3d DCA 1973); *In Re Estate of Merz*, 273 So. 2d 795 (Fla.

2d DCA), *cert. denied*, 278 So. 2d 627 (Fla. 1973); *Alter v. Finesmith*, 214 So. 2d 732 (Fla. 3d DCA), *cert. denied*, 225 So. 2d 538 (Fla. 1968); *Re Adoption of Arnold*, 184 So. 2d 192 (Fla. 4th DCA 1966); *Pokress v. Josephart*, 152 So. 2d 756 (Fla. 3d DCA 1963).

C. Subsection (3) Is Integral to the Legislation and Cannot Properly Be Severed

The history, purpose and structure of the trafficking law all demonstrate a unified legislative scheme. The trial court thus correctly decided that no severability should be afforded to Subsection (3) in an effort to save Subsections (1) and (2). (SR 70-72). Therefore, this legislative experiment must stand or fall as a unit.

In *State ex. rel. Boyd v. Green*, 355 So. 2d 789, 794-95 (Fla. 1978), the Court recently stated the test for severability:

> Where one provision is unconstitutional, all provisions dependent on it must also fall. The result is the same even though (the statute) contains a severability clause. The test remains whether the portion to be stricken is of such import that the remainder would not be complete or would cause results not contemplated by the Legislature.

(Citations omitted)

The legislative scheme which motivated upping the ante for drug violators would be frustrated by severing Subsection (3) from it. The enhanced, mandatory minimum sentences were enacted dependent upon the belief that the severity would routinely be avoided by the operation of Subsection (3). It is unlikely that these penalties -- expressly designed to create intolerable human pressures -- would have been enacted without the escape valve device. Therefore, the entire legislation should fall along with Subsection (3). *High Ridge Management Corp. v. State*, 354 So. 2d 377 (Fla. 1977); *Presbyterian Homes of Synod of Florida v. Wood*, 297 So. 2d 556, 559 (Fla. 1974); *State ex. rel. Limpus v. Newell*, 85 So. 2d 124, 128 (Fla. 1956); *State v. Calhoun County*, 127 Fla. 304, 311-13, 170 So. 883, 886 (1963);

State ex. rel. West v. Hilburn, 70 Fla. 55, 61-62, 69 So. 784, 786 (1915); *Dade County v. Keys*, 141 So. 2d 819, 821-22 (Fla. 3d DCA 1962), *cert. discharged*, 152 So. 2d 171 (Fla. 1963).

The Legislature plainly never intended that every person who, for whatever reasons, became entangled in the non-violent crime of drug trafficking would be exiled to prison without consideration of probation or parole. Exactly the opposite is true. The Legislature believed that most violators would succumb to the pressure. The Legislature thus never considered the fiscal impact and other consequences upon the prison system of automatic, unredeemable incarceration. Further, we pray the Legislature never intended the dreadful human impact, the indiscriminate suffering, which would result from severability of Subsection (3). Because of such uncontemplated results, severance is inappropriate. *State v. Lee*, 356 So. 2d 276, 284 (Fla. 1978); *State ex. rel. Boyd v. Green*, 355 So. 2d 789, 795 (Fla. 1978); *State ex. rel. James v. Gerrell*, 137 Fla. 324, 330, 188 So. 812, 185 (1939); *Hayes v. Walker*, 54 Fla. 163, 168, 40 So. 747, 749 (1907). Because we are construing a penal statute, this should be particularly true. If Subsection (3) is defective, the draconian penalties imposed by Subsection (1) and (2) should not be saved.

II.

THE TRAFFICKING LAW INFRINGES UPON THE CONSTITUTIONAL RIGHT OF SILENCE SINCE IT DELIBERATELY IMPOSES A PENALTY FOR FAILING TO INFORM AUTHORITIES ABOUT MATTERS WHICH ARE NATURALLY AND NECESSARILY SELF-INCRIMINATORY AND GRANTS NO IMMUNITY TO THOSE WHO SUCCUMB TO THE COERCION.

A. *The Right of Silence*

Perhaps the time has arrived for a little rhetoric from the defense. We prefer ours, however, from a source

which embodies nearly a millenium of experience -- the Constitutional right of silence. Excesses in prosecuting heresy and treason helped to crystalize the privilege against self-incrimination. *See generally,* Levy, *Origins of the Fifth Amendment* (1968); Berger, *Taking the Fifth* 1-23 (1980). The right has now been enshrined in our Constitutions. Art. I, Section 9, Fla. Const.; U.S. Const. amend. V and XIV. We pray that it will survive the present war on drug trafficking.

In *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 55, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964) the Supreme Court explained the policies of the privilege:

> The privilege against self-incrimination "registers an important advance in the development of our liberty -- 'one of the great landmarks in man's struggle to make himself civilized.' " It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statement; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."
>
> (Citations omitted)

See also, Tsavaris v. Scruggs, 360 So. 2d 745, 754, 755 (Fla. 1978) (England, J., dissenting). We conclude that the "substantial assistance" device of the trafficking statute is at war with the right of silence itself.

B. Rendering "Substantial Assistance" Without A Grant of Immunity Poses a Real Danger of Self-Incrimination

Subsection (3) demands that one who has already been convicted of trafficking render "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Such assistance naturally and necessarily requires the informer to admit that he was situated to know what he claims. Ordinarily the disclosures will reveal the informer's own role in whatever crimes may have been committed. In this setting, rendering "substantial assistance" can only tend to "furnish a link in the chain of evidence," *Hoffman v. United States,* 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118, 1122 (1951), tying the informer, himself, to the crimes. *E.g., United States v. Acosta,* 501 F. 2d 1330, 1335, 1338 (5th Cir. 1974) (Gee, J., dissenting from suppression of evidence but advocating resentencing)*; *see generally, In re Brogna,* 589 F. 2d 24 (1st Cir. 1979).

The Appellant recognizes the danger of self-incrimination but would invade the Constitutional implication with a simplistic rewriting of the statute (Brief of Appellant at 30):

> . . . a proper and sufficient reading of the plain and specific language of the statute on its face, provides that the "substantial" information sought, is for "accomplices, accessories, co-conspirators or principals" in the case of *trafficking,* for which a defendent has already been convicted!!! A proper and narrow reading of the statute to insure its *constitutionality,* restricts its facial application to the crime of "trafficking", *for which the defendant has been convicted.* If the

* Judge Gee's sentencing position was adopted by the Court *en banc.* 509 F.2d 549 (5th Cir. 1975).

> defendent wishes to "spill the beans" on any other crimes at other times, in which he may have been involved in or may have seen, -- that choice is his to make. (Emphasis and exclamation points in original)

But truth is not that simple.

First and foremost, even assuming that the "substantial assistance" must relate to the crime of trafficking as defined by Section 893.135, Fla. Stat. (1979), the *information* furnished could obviously nonetheless forge links to numerous other crimes. Elsewhere the State itself alludes to "lesser offenses" (Brief of Appellant at 9, n. 5) and "reduced charges" under State drug laws. (*Id.* at 10, n.6). See Section 893.13, Fla. Stat. (1979). One obvious offense is a controlled substance conspiracy in violation of Section 777.04 (3), Fla. Stat. (1979). *See generally, Goldberg v. State,* 351 So. 2d 332 (Fla. 1977). The same information could be used to prosecute for participating in an "enterprise" through a pattern of racketeering activity "relating to drug abuse prevention and control" in violation of the Florida RICO Act. See Sections 943.46 *et. seq.*, Fla. Stat. (1979).* The criminal information disclosed could also be used in any subsequent prosecution to aggravate the penalty imposed or to support a finding that "it is necessary for the protection of the public to sentence the defendant to an extended "term" as an habitual offender. See Section 775.084 (3), Fla. Stat. (1979).

* One who has been convicted of "trafficking" in controlled substances apparently enjoys no double jeopardy protection against a properly drawn RICO accusation. *See United States v Smith,* 574 F.2d 308 (5th Cir. 1978). Nor does a trafficking conviction promise immunity from a drug conspiracy prosecution or other controlled substance charges drawn under §893.13, Fla. Stat. (1979). *See generally, United States v. Rodriguez,* F.2d , No. 77-5339, 5th Cir. Feb. 27, 1980.

Moreover, the United States Supreme Court has held that "the Constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law . . ." *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 77-78, 84 S. Ct. 1594, 12 L. Ed. 2d 678, 694 (1964); *see United States v. Metz,* 608 F. 2d 147, 156 (5th Cir. 1979); *In re Brogna,* 589 F. 2d 24, 27 (1st Cir. 1978). Federal law abounds with imperiling legislation such as the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Sections 801 *et. seq.*), the Travel Act (18 U.S.C. Section 1952) and, of course, the federal RICO statutes (18 U.S.C. Sections 1961 *et. seq.*) and also with prosecutors eager to wield these laws against even those who have been prosecuted for related offenses by State authorities. *See, e.g., Rinaldi v. United States,* 434 U.S. 22, 98 S. Ct. 81, 54 L. Ed. 2d 207 (1977).*

In reality, drug crimes are subject to prosecution under layers and layers of state and federal statutes which intertwine with, overlap and surround the offense of trafficking. Therefore, the setting is instinct with peril of self-incrimination.

It must be remembered, conviction of one offense in one jurisdiction does not grant any immunity from prosecutions for violations of other applicable statutes of that jurisdiction or of other jurisdictions. The Courts, therefore, have commonly held that citizens retain important self-incrimination rights even after a conviction. *E.g., United States v. Rodriguez,* 498 F. 2d 302, 312-313 (5th Cir. 1974); *United States v. Rogers,* 504 F. 2d 1079, 1084-85 (5th Cir. 1974); *United States v. Yurasovitch,* 580 F. 2d 1212 (3d Cir. 1978); *United States v. Metz,* 608 F. 2d 147, 156 (5th Cir. 1979); *see Malloy v.*

*The Double Jeopardy Clause of the Fifth Amendment to the federal Constitution does not protect against a second prosecution by a separate sovereignty. *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Barthus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959).

Hogan, 378 U.S. 1, 12-14 & n. 9, 84 S. Ct. 1489, 12 L. Ed. 2d 661-63 (1964). Nor does this protection evaporate upon a prosecutor's denial of a present intention to prosecute for crimes committed within his jurisdiction. *E.g., In re Brogna*, 589 F. 2d 24, 28 (1st Cir. 1978). Rather, the prosecutor must grant full immunity co-extensive with the defendant's remaining vulnerability to prosecution or refrain from questioning him. *Id.*

Second, in any event, there is no reason to assume that the "substantial assistance" -- as already distinguished from the information itself -- must be confined to the crime of trafficking as the State argues. Subsection (3) does not contain such language.* The State overlooks Section 775.021 (1), Fla. Stat. (1979), which declares that provisions of the Florida Criminal Code "shall be construed most favorably to the accused." In this instance, surely the Legislature never intended its panacea "substantial assistance" provision to be read narrowly and restrictively as the State now urges. Quite to the contrary. And, just as surely, if the legislation is upheld the State will use its new "investigative tool" expediently, as it sees fit, in the future.

Finally, judicial rewriting of the statute will not save it anyway. Judicial narrowing here would at once defeat legislative intent and leave fundamental rights chilled. Therefore, the State's invitation to do so should be declined. *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978); *State v. Egan*, 287 So. 2d 1 (Fla. 1973); *Lochlin v. Pridgeon*, 30 So. 2d 102 (Fla. 1947).

C. The Long Mandatory Minimum Prison Penalties Exact a Forbidden Price on Exercise of the Right to Remain Silent

Compelling or coercing testimony without a full and formal guarantee that it will not ever be used, directly or

* "Accessories" may be guilty of a crime under §777.03, Fla.Stat. (1979), and "Co-conspirators" under §777.04(3), Fla.Stat. (1979), but neither can be guilty of "trafficking" as Section 893.135 is written.

indirectly, to further any criminal prosecution which might be brought against the subject offends basic precepts of our accusatorial system of justice. *Kastigar v. United States,* 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Subsection (3) totally fails to provide such immunity. Therefore, it is invalid upon its face.

The protection of the privilege against self-incrimination have been construed as two-fold. First, it prohibits the use in a criminal trial of compelled self-incriminatory statements. Second, it prohibits the use of compulsion to elicit a waiver of the right to assert it. *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 57 n. 6, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1962). The right to insist upon silence is deemed so essential to the maintenance of our accusatorial system, *Malloy v. Hogan,* 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1962), that the Supreme Court has held it to be one of those "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. New Jersey,* 385 U.S. 493, 500, 87 S. Ct. 625, 17 L. Ed. 2d 564 (1967). It secures "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty. . .for such silence." *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1962). In *Spevack v. Klein,* 385 U.S. 511, 515, 87 S. Ct. 625, 17 L. Ed. 2d 594 (1967), the Court held:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California,* 380 U.S. 609, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly".

Any penalty will be found invalid. *Spevack v. Klein, supra,* (penalty of disbarment for failure to testify overturned); *Gardner v. Broderick,* 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968) (statute penalizing failure to waive privilege by imposing loss of employment held invalid); *Sanitation Men v. Sanitation Comm'r.,* 392 U.S. 280, 284, 88 S. Ct. 1917, 29 L. Ed. 2d 1089 (1968) (statute giving public employees "a choice

between surrendering their constitutional rights or their jobs" held unconstitutional); *Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (statute providing for cancellation of pending contracts and prohibiting any further business transactions with State upon assertion of privilege held invalid); *Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1, (1977) (statute prohibiting political party officer who asserted the privilege from holding public office for five years found unconstitutional); *Slochower v. Board of Education,* 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956) (summary discharge of professor upon invoking the privilege is unconstitutional). *See also, Anson v. Department of Revenue,* 354 So. 2d 386 (Fla. 1st DCA 1977); *Lurie v. Florida State Board of Dentistry,* 288 So. 2d 223 (Fla. 1973); *Ciravolo v. The Florida Bar,* 361 So. 2d 121 (Fla. 1978). Even if the penalty merely affects one's reputation or extinguished "legally unenforceable (economic) prospects" it constitutes the type of compulsion prohibited by the privilege against self-incrimination and must be invalidated. *Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d $ (1977); *Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). The ban on penalizing the choice to remain silent is absolute. As Mr. Chief Justice Burger stated for the Court in *Lefkowitz v. Cunningham,* 431 U.S. at 808:

> We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need. *E.g., Lefkowitz v. Turley,* 414 U.S. at 78-79. Government has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in Garrity, Gardner, and Sanitation Men, where alternative methods of promoting state aims were no more apparent than here. (Footnote omitted)

The penalty trafficking defendents are subjected to far surpasses the mere loss of a job or the expectancy of future governmental contracts. It is much more than the impairment of their reputation. If Section 893.135 is allowed to stand, they will be subjected to mandatory minimum sentences of 15 years' incarceration (with apparently no maximum limit). They will lose all right to individualized sentencing, mitigation, probation or parole. Such impairment of their fundamental right to liberty, *compare Lefkowitz v. Cunningham,* 431 U.S. at 807, must demand as much, if not more, protection by the Fifth Amendment and by Article I, Section 9 of the Constitution of this State, than the mere threat of pecuniary loss.

The right of silence does indeed protect the convicted at time of sentencing. Where judges have avowed to punish silence or failure to cooperate against others, the sentences have been vacated as unconstitutionally coercive, upon the same rationale as those cases cited above. For example, in *Thomas v. United States,* 368 F. 2d 941 (5th Cir. 1966) the trial judge had indicated that if the defendant would confess his guilt at sentencing he would receive a more lenient sentence but, if he persisted in his denial of wrongdoing, the court would take that into account. In vacating the sentence and remanding for sentencing, the Court of Appeals stated, 368 F. 2d at 946:

> When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judically imposed penalty by exercising his constitutionally guaranteed rights.

Accord, United States v. Wright, 533 F. 2d 214 (5th Cir. 1976); *United States v. Rodriguez,* 498 F. 2d 302 (5th Cir. 1974). Such sentencing has been held to be "plain error". *United States v. Rodriguez, supra* at 312. In so holding, the Courts have repeatedly recognized that a defendant "retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be

made the price of sentencing leniency." *Id.; Thomas v. United States,* 368 F. 2d 941 (5th Cir. 1966); *see also, United States v. Yurasovich,* 580 F. 2d 1212 (3rd Cir. 1978).

In a case strikingly similar to the statutory sentencing procedure embodied in Section 893.135, the Court of Appeals vacated a sentence where the trial court had indicated its disapproval with the defendant for not cooperating with the government in identifying his co-conspirators. *United States v. Rogers,* 504 F. 2d 1079 (5th Cir. 1974. The trial court indicated that it considered such cooperation the first step towards rehabilitation. Therefore, a lesser sentence would be considered if the defendant gave material and productive cooperation to the government. The appellate court held that there was no distinction between confessing guilt and possibly implicating oneself by implicating others. To request such assistance was as much an unconstitutional imposition upon ones right to remain silent as confessing guilt was. *Accord, United States v. Acosta,* 501 F. 2d 1330, 1337-78 (5th Cir. 1974) (dissenting opinion of Judge Gee captioned "The Sentencing Procedure"), *adopted en banc,* 509 F. 2d 539 (5th Cir. 1975). As was persuasively stated in *United States v. Garcia,* 544 F. 2d 681, 685 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentence to stand. (Footnote omitted)

Contrary to this body of law, under Subsection (3), the Florida Legislature has mandated an unconstitutional, coercive means of obtaining evidence. Worse, the Legislature seeks to force the Judicial Branch to embrace this unconstitutional sentencing procedure. But the very purpose of the Judiciary is to protect the accused against

the excesses of the Legislature and the Executive and to defend the State and federal Constitutions from embreachment. This statute cannot be allowed to stand.

D. Federal Pre-Conviction Plea Bargaining Cases Do Not Justify the Florida Legislature's Inquisitorial Post-Conviction Information Bargaining Experiment.

In an effort to overcome the defendant's self-incrimination claims, the State has attempted to rely upon a number of recent federal decisions depending oon plea bargaining and guilty pleas. *E.g., Corbitt v. ew Jersey,* 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978); *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *e.g., Brady v. United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Holdings about the fairness of plea bargaining or common penalty structures and the voluntariness of pleas entered by defendants cannot automatically be transferred to Subsection (3) which applies only to defendants who have been already convicted.

Ordinary plea-related cases face such questions as whether a plea was voluntarily entered because a defendant faced har choices. In countenancing pressures resulting from such a situation the Court has relied upon the formal judicial character of the crucial proceedings. Because the defendant enjoys the right to attend the plea proceedings, has the assistance of counsel to advise him in weighing the choices and because the entire proceeding is presided over by a judge, involuntariness and/or unfairness cannot be as readily assumed as they would be otherwise. *See Bordenkircher v. Hayes, supra,* 434 U.S. at 362, 363. We have demonstrated elsewhere that the post-conviction "plea" bargaining procedure erected by Subsection (3) eschews these procedural due process safeguards. (See Argument Point IV below) The Supreme Court elaborates upon this distinction in *Brady v. United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

In *Brady* the Supreme Court assumed that the

defendant entered a guilty plea in order to avoid the possibility of a death sentence which could be imposed only if the defendant opted for a jury trial and the jury recommended the ultimate penalty. In arriving at this result the Court took pains to distinguish *Bram v. United States,* 168 U.S. 532, 18 S. Ct. 182, 42 L. Ed. 568 (1897), the germinal case addressing the question of the voluntariness of extra-judicial confessions. The *Brady* court stated, 397 U.S. at 754:

> *Bram* is not inconsistent with our holding that Brady's plea was not compelled even through the law promised him a lesser maximum penalty if he did not go to trial. Bram dealt with a confession given by *a defendant in custody, alone and unrepresented by council.* In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the *possibly coercive atmosphere of the police station* could not be counter-acted by the *presence of counsel or other safeguards.* Emphasis added) (Footnote omitted)

Subsection (3) of course inaugurates a regime of so-called plea bargaining for convicts who are given the opportunity to provide "substantial assistance". The law, by its own terms, exacts such cooperation during a time frame after the defendant has become "convicted" but before the State Attorney initiates a motion to reduce or suspend the prison sentence. Thus, the defendant must strike his deal, if any, and render his own

self-incriminatory performance before the prosecutor steps into a courtroom to seek the *guid pro quo* of leniency. We gather from the legislative history that the deal will often be struck behind prison bars* and we assume that the official contact will often be made by police offficers rather than prosecutors. *See State v. Hargis*, 328 So. 2d 479 (Fla. 1st DCA 1976). In any event, the circumstances do not resemble pre-conviction plea bargaining where the accused is not called upon to give up his privilege against self-incrimination until the prosecution has performed or entered into a binding agreement to perform, *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), and a judge has determined that the defendant's proposed plea constitutes a voluntary, intelligent and counseled waiver of known rights. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Pre-conviction plea bargaining and post-conviction information bargaining advance entirely different interests. Plea bargaining can serve everyone's interest in limiting the hazards and burdens of litigation. In post-conviction information bargaining under Subsection (3), however, the defendant must give up certainty -- albeit, the deliberately imposed certainty of a long prison sentence -- and run the hazards of self-incrimination in exchange for whatever lenience may ultimately be dispensed as a result of cooperating. Subsection (3) imposes a "cruel trilemma", *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 55, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964) of self-incrimination false assistance or perjury, or the potent penalty of automatically continued incarceration.

* Compare §950.09 Fla.Stat. (1979), first enacted in 1832 and which now provides:
Malpractice by jailers. If any jailer shall, by too great duress of imprisonment or otherwise, make or induce a prisoner to disclose and give evidence against some other person or be guilty of willful inhumanity and oppression to any prisoner under his care and custody, he shall be punished by removal from office and shall be guilty of a misdemeanor of the second [*illegible*]

Moreover, in post-conviction plea bargaining the State gives up no counts against a defendant it might not be able to convice at all otherwise. Rather, at worst, it may give up some prison time against an already convicted defendant. Moreover, that excess prison time would probably not have been enacted or imposed in the first place without Subsection (3). What the State gains in information bargaining it precisely what the privilege against self-incrimination prohibits absent an immunity grant.

The differences are fundamental. Pre-conviction plea bargaining is humane and practical. Post-conviction information bargaining is unfair and inquisitorial.

We would be remiss if we ignored another distinction between pre-conviction and post-conviction plea bargaining. The Supreme Court has, of course, been sensitive to the felt necessities of processing criminal cases. Plea bargaining helps ease the burden on overcrowded courts in this less than "ideal world". *Blackledge v. Allison,* 431 U.S. 63, 71, 97 S. Ct. 1621, 1627, 52 L. Ed. 2d 135 (1977); *Bordenkircher v. Hayes,* 434 U.S. 357, 361-62, 98 S. Ct. 663, 54 L. Ed. 2d 604, 609-10 (1978). Post-conviction plea bargaining comes too late to serve this expediency in a like way.

The final answer to the question, of course, will not necessarily be found in Federal cases. Recent United States Supreme Court cases have reverted to analyzing the federal Bill of Rights as it applies to the States through a Fourteenth Amendment "Due Process" balancing approach. Although this new deference to state court decisions may be understandable in these times of new federalism, it does not answer the ultimate question facing this Court. What protection has been promised to the People of Florida by our State Constitution and by the terms of the Fifth Amendment itself? It is the responsibility of this Court, we submit, to apply our self-incrimination guarantees directly, not to water them down through a Due Process analysis and to balance them away. *See generally,* Brennan, *State*

Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 484 (1977).

We suspect the ultimate answer will be found in the ability of this Court to recognize an inquisitorial experiment posing a menace to our accusatorial system of justice. Some may be shocked that the Legislature would purposefully arm prosecutors with "enough of a hammer over (a defendant's) head to make them talk." (R 60) Others, perhaps less surprised, may recall the oft repeated admonition of Mr. Justice Bradley speaking for the Court almost a century ago in *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746 (1886):

> It may be that it is the obnoxious thing its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

III.

THE UNIQUE SENTENCING PROCEDURE ENACTED BY THE LEGISLATURE TO CARRY OUT ITS TRAFFICKING CONTROL LAW VIOLATES THE SEPARATION OF POWERS DOCTRINE WHICH IS CENTRAL TO THE FLORIDA CONSTITUTION.

Our State Constitution creates three separate but equal branches of government:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.
>
> Art II, Section 3, Fla. Const.

This deliberate separation of powers represents much more than a mere practical solution to governmental structure. As this Court stated in *Petition of the Florida Bar Association,* 61 So. 2d 646, 647-48 (Fla. 1952):

> The distribution of powers into three branches was not designed to promote haste or efficiency but to head off autocratic power and insure more careful deliberation in the promulgation of governmental policy. Reason and forethought are its great components. The makers of the Constitution knew the evils of arbitrary power and used every means at hand to prevent it.

Again, as the Court reminded us in *In Re Advisory Opinion to the Governor,* 276 So. 2d 25, 30 (Fla. 1973), "[T]his doctrine is designed to avoid excessive concentration of power in the hands of one branch."

The Legislature -- by enacting Section 893.135 (3) -- has sought to strip the Judiciary of its traditional sentencing functions and its rule-making powers and, moreover, to delegate these sensitive functions to the Executive Branch. This experiment transgresses our organic law.

A. Subsection (3) Constitutes a Prohibited Encroachment of the Legislature Upon This Court's Procedural Rule-Making Power.

The Constitution expressly confers upon the Judiciary the power to promulgate rules of practice and procedure for all our courts. Art. V, Section 2(a), Fla. Const. The Supreme Court has exercised this power by enacting the

Florida Rules of Criminal Procedure. *See In Re Florida Rules of Criminal Procedure,* 272 So. 2d 65 (Fla. 1972). The only Legislative check upon this judicial rule-making power results from the concluding language of the provision: ". . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature." *Id.*

The limited Constitutional power to repeal this Court's rules of practice and procedure emphatically does not constitute a grant of separate court rule-making power in the Legislature. The power to "repeal" a rule of court does not allow any power to "amend", *Johnson v. State,* 336 So. 2d 93, 95 (Fla. 1976), or to "enact", *State v. Smith,* 260 So. 2d 489 (Fla. 1972); *In Re Clarification of Florida Rules of Practice and Procedure,* 281 So. 2d 204 (Fla. 1973), a procedural rule.

Subsection (2) of the new law simply prohibits the usual alternatives of adjudication of guilt and imposition of sentence and prohibits usual parole eligibility. The Legislature in passing mandatory minimum sentence laws of course departs from a tradition in which the Judiciary has largely had the power to exercise its discretion and to individualize sentencing. For purposes of our present argument, we do not challenge the Legislature's general power to establish mandatory sentences. And enactment of such laws may further be viewed as an implied repeal of contrary rules of practice and procedure promulgated by this Court.*

But Subsection (3) of the law surges far beyond mere prohibition of usual court procedures for mitigation of sentences. While Subsection (2) withdraws sentencing discretion from the Judiciary, Subsection (3) attempts to redelegate basic sentencing discretion to the Executive Branch. Moreover, it "initiates" or "enacts" new procedures and "amends" old procedures to carry out this extraordinary transfer of power to prosecutors.

** Ch.79-1, Laws of Fla. -- now §893.135, Fla.Stat. -- passed both Houses by more than two-thirds' vote.*

What, specifically, has the Legislature wrought? Subsection (3) authorizes a new procedure for the initiation of a motion in a sentencing court. The procedure, of course, aims at the reduction or suspension by the court of the mandatory minimum sentences imposed upon persons convicted of trafficking It therefore conflicts with Fla. R. Crim. P. 3.800(b) which excludes mandatory minimum sentences from reduction at any time after imposition.* Further, Rule 3.800 provides that a motion to reduce, when permitted, must be brought within sixty days after the imposition of sentence or ennumerated other events. Subsection (3), however, purports to grant power to suspend or reduce a sentence without any time limit at all.

Moreover, Rule 3.800 places no restriction upon who may petition the Court for such reduction. But Subsection (3) allows only that the prosecutor may so petition. Worse, Subsection (3) also gives the arresting agency, but not the defendant, the opportunity to be heard in aggravation or mitigation. Contrast Fla. R. Crim. P. 3.720(b) which provides: "At the (sentence) hearing the sentencing court shall:. . . (b) Entertain submissions and evidence by the parties which are relevant to the sentence; . . ." Nor does Rule 3.800 decree a one-sided procedure.

Finally, in keeping with its half-adversarial nature, Subsection (3) inaugurates a new regime of post-conviction plea bargaining stripped of the procedural safeguards which this Court promulgated for plea bargaining in Fla. R. Crim. P. 3.171 (See also Argument IV)

In short, the Legislature has put itself in the business of writing rules of practice and procedure for the courts. The "machinery" enacted "encompasses the course, form, manner, means, method, mode, order, process or steps", *see, In Re Florida Rules of Criminal Procedure,* 272 So. 2d 65, 66 (Fla. 1972), by which prosecutors

* *Rule 3.800[b] was, of course, expressly amended in 1977 to deal with nondiscretionary sentencing.* In Re Florida Rules of Criminal Procedure, *343 So.2d 1247 [Fla. 1977].*

enforce their new right to reduce or suspend mandatory sentences. The result, of course, was intended to be a rack for the accused. But it cannot be allowed to operate.

This new law sorely abuses our basic constitutional design of checks and balances, imbalances the scales of justice and, moreover, exceeds the Legislature's power under Art. V, Section 2, Fla. Const. *E.g., Johnson v. State,* 308 So. 2d 127 (Fla. 1st DCA 1975) (statute imposing mandatory duty to order presentence investigation report passed by two-third's vote of Legislature ineffective repeal of Fla. R. Crim. P. 3.170, making the ordering of a pre-sentence investigative report discretionary with the judge, in that the effect was not to "repeal" but to "amend" or "supersede"); *Huntley v. State,* 339 So. 2d 194 (Fla. 1976) (*semble*); *Johnson v. State,* 336 So. 2d 93 (Fla. 1976) (finding statute which required court to destroy records to effectuate its expungement statute the initiation of a procedural rule which exceeded the Legislature's repeal power); *State v. Garcia,* 229 So. 2d 236 (Fla. 1969); *see In Re Clarification of Florida Rules of Practice and Procedure,* 281 So. 2d 204 (Fla. 1973). It should be declared null and void.

B. Subsection (3) Impermissibly Delegates Control over the Judicial Sentencing Function to the Executive Branch and Thereby Distorts the Adversary Process Itself.

Our law and traditions, of course, impose the greatest restraints upon Government when the State seeks to take the life or liberty of the People. In addition to the Declaration of Rights, our Constitution divides and separates penal power in accordance with our commitment to an adversarial system of justice. It vests the Legislative Branch with the power to proscribe crimes and establish punishments. Although the Constitution does not confer this power upon the Legislature in so many words, the responsibility is implicit in the separation of powers itself, *compare* Art. II, Section 3, Fla. Const., *with* Art. III, Fla. Const., since these are inherently legislative functions. *See Owens v. State,* 316 So. 2d 537, 538 n.6 (Fla. 1975). It confers the

power to enforce the laws upon the Executive Branch, Art. II, Section 3, Fla. Const.; Art. IV, Section 1(a), Fla. Const., and specifically establishes the office of State Attorney and authorized it to prosecute violations of state law in trial courts. Art. V., Section 17, Fla. Const. Although it does not in so many words confer the responsibility upon the Judiciary to preside over charges that the law has been broken and to impose penalties upon violators, this is inherently a judicial function. *See Rhynes v. State,* 312 So. 2d 520, 521 (Fla. 4th DCA 1975) (distinguishing between "the legislative function of prescribing penalties and the judicial function of imposing them).

We thought all this was basic. But Subsection (3) of the new law transfers basic control over the sentencing function to the State Attorney. As the trial court found, the Legislature has "delegate (d) to the Executive Branch (i.e., the State Attorney) the ultimate sentencing function which constitutionally must vest exclusively in the Judicial Branch." (Order of the Honorable Jon I. Gordon, SR 69). The Prosecutor has now been given an actual grip on the scales of justice. But, this "sleight of hand" exceeds the Legislature's power. (Id.)

The difficulty only begins with excess of Legislative power. Vesting the State Attorney with "powers appertaining to" the Judicial Branch, Art. II, § 3, Fla. Const., also exceeds the power granted to State Attorneys as "prosecuting officer(s)", Art. V, § 17, Fla. Const., and encroachments upon the vested power of the Judiciary.

First, the State Attorney has now been cloaked with exclusive power to let long mandatory sentences run or to seek mitigation solely to advance selfish law enforcement purposes. The "excessive concentration of power in the hands of one branch" is bad enough. *In Re Advisory Opinion to the Governor,* 276 So. 2d 25, 30 (Fla. 1973). Worse, the Legislature has placed initial control and basic influence over a sensitive, awesome responsibility in the hands of the accuser. This merger of prosecuting and sentencing functions distorts the

adversary process and undermines Due Process itself.

We are reminded of *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927). In *Tumey* the presiding judge also served as mayor of the village. Any convictions he imposed could result in fines which contributed to support of the village's detectives and prosecuting attorneys and in fees and costs which contributed to the support of the Mayor/judge himself. The Supreme Court held, 273 U.S. at 534:

> A situation in which an officer perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law.

See also, Connally v. Georgia, 429 U.S. 254, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977).

Second, the Judiciary has now been harnessed to carry out law enforcement functions. The very integrity and independence of the court is jeopardized by a procedure in which other Branches seek to enforce the law by drawing upon the power of the courts to impose punishment for crime but at the same time seek to imbalance that process. The courts can perhaps be conscripted to mete out severe sentences, but they cannot then be yoked to mitigate the sentences only at the instance of a prosecutor and only to serve the interest of the constabulary. To change the metaphor, the State cannot tie the hand of the Court to individualize sentencing in the interest of justice and at the same time command the Court's other hand to reward only those who yield to the law enforcement inquisition and become informers. *See generally,* Hart and Wechsler, *The Federal Courts and the Federal System* 315-16, 336-44 (2d ed. 1973). A strong, free and independent Judiciary is essential to the preservation of liberty.

In conclusion, Subsection (3) must be rejected as inconsistent with our way of government.

IV.

OUR CONSTITUTIONS CONDEMN THE ONE-SIDED SENTENCING FEATURES OF SUBSECTION (3) WHICH DEPRIVE DEFENDANTS OF PROCEDURAL SAFEGUARDS BASIC TO ALL CRIMINAL PROCEEDINGS, SENTENCING AND PLEA BARGAINING* AND WHICH ALSO DENY ACCESS TO THE COURTS FOR REDRESS OF GRIEVANCES

The State has pinned its hopes of reversal to a characterization of Subsection (3) of the new law as a post-conviction plea bargaining device (see Brief of Appellant at 10, 21, 22, 30-32, 38, 40-41, 46-47). The Legislature in fact designed and intended Subsection (3) as the vehicle by which the *real* sentence would ordinarily be set in trafficking cases (see Argument Point I). But, in either case, the legislation is doomed. Subsection (3) flouts the requirements of basic procedural due process.

A. Since Subsection (3) is Designed so as to Impose the Real Sentence in the Absence of the Defendant and His Counsel, it Must be Declared Unconstitutional.

Sentencing is a critical stage of the criminal process. *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (probation revocation and deferred sentencing proceeding). Thus a defendant enjoys an unqualified Sixth and Fourteenth Amendment right to be represented by counsel in such proceedings. *Id.* at 137. In addition to the right to counsel, "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 3939 (1977). There the Court said:

> The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Id.

Accord, Witherspoon v. Illinois, 391 U.S. 510, 521-23, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

Even if a Subsection (3) were characterized as providing merely a post-conviction "remedy" distinct from the actual sentencing, due process must still be satisfied. Where post-conviction dispositions require the finding of new facts or where a "distinct issue" from that of guilt must be resolved (such as whether a defendant has indeed rendered "substantial assistance"), due process requires that the defendant receive "reasonable notice and an opportunity to be heard." *Specht v. Patterson*, 386 U.S. 504, 510, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967) (holding that when an indeterminate sentence may be imposed only after a finding that a defendant is an habitual offender, due process must be afforded him). There the Court defined the procedures necessary at such a hearing:

> Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

Our State Constitution, of course, also demands due process of law. Art. I, Section 9, Fla. Const. Moreover, it specifically guarantees that "[i]n all criminal prosecutions the accused. . . shall have the right. . . to be heard in person, by counsel or both. . ." Art. I, Section 16, Fla. Const. Our Rules of Criminal Procedure further guarantee the right to assistance of counsel, Fla. R. Crim. P. 3.160(e), specifically including the participation of counsel in all pre-conviction plea discussions and agreements, Fla. R. Crim. P. 3.171(a), and the assistance of counsel at all plea proceedings, Fla. R. Crim. P. 3.180(a) (9) and, even more basically, the right

to a hearing itself upon the question of sentence. Fla. R. Crim. P. 3.720.

Notwithstanding this body of law, Subsections 893.135 (2) and (3) fail to provide any procedural safeguards at all. Several legislators saw that this lack of procedure created a constitutional infirmity in the statute and attempted to rectify it with an amendment reading as follows:

> On page 3, line 28 after the period insert, "the Court shall conduct a hearing with respect to the reduction or suspension of the sentence and the Defendant shall be entitled to be present at such hearing.
> (R 61)

Representative Marinez, the amendment's sponsor stated:

> Ladies and gentlemen of the House, this Amendment cures what I think might be a defect in what is a good bill; the Amendment, I think, merely gives it a little safeguard;. . . he (the defendant) can't go to the judge later and say, "Judge the State Attorney welched . . . the Defendant under the way the Bill is worded doesn't even have to be present. . .
> (R 61-62)

Representative Sampler reiterated these concerns:

> It would seem to me that you (are) denying anyone who happens to have his life or his term in jail in jeopardy a trial in court, so what, it's a mini-trial? He is entitled to this. I think Mr. Martinez' Amendment is exactly right, and I think that (if) this kind of justice is not accorded the Defendant in writing in this Bill it will throw in jeopardy the very fine Bill that otherwise is.
> (R 63)

Notwithstanding these warnings, the amendment was rejected. (R 63)

What is the upshot of all this? The Legislature has devised a procedure for setting the *real* sentence in a criminal case. It has refused to allow the defendant any hearing in connection with this critical event, let alone such amenities as the right to be present and to be represented there by counsel. (In contrast, however, it has taken care to assure that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation. . . .") Thus, the Legislature has deprived trafficking defendants rudimentary procedural due process.

We are very much reminded of what the Supreme Court had to say in the highly analogous setting found in *United States v. Behrens*, 375 U.S. 162, 84 S. Ct. 295, 11 L. ed. 2d 224 (1963). The defendant there had been convicted and, under a special statute, sentenced mandatorily to the maximum term of imprisonment provided for the crime. The statutory purpose of such a commitment is to allow a three to six month study of the accused to secure ". . . more detailed information as a basis for determining the sentence to be imposed. . . ." After the court received a report from the Bureau of Prisons, it reduced the sentence as permitted by the statute. But neither the defendant nor his counsel were present when this "modification" occurred.

The Supreme Court decided that such a procedure was forbidden. Although the Court did not have to reach the constitutional questions inhering in the circumstances, it alluded to the "ancient" right of allocution and insisted that both the defendant and his counsel had to be present "when the sentence that counts is pronounced":

> The use of Section 4208(b) *postpones* action as to the final sentence; by using that section the court decides to await studies and reports of a defendant's background, mental and physical health, etc., to assist the judge in making up his mind as to what the final sentence shall be. It is

only then that the judge's final words are spoken and the defendant's punishment is fixed.

It is then that the right of the defendant to be afforded an opportunity to make a statement to the judge in his own behalf is of most importance. This right, ancient in the law, is recognized by Rule 32(a) of the Federal Criminal Rules, which requires the court to "afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." This right would be largely lost in the Section 4208 proceeding if for administrative convenience the defendant were not permitted to invoke it when the sentence that counts is pronounced. We hold that it was error to impose this sentence in the absence of respondent and his counsel. (Emphasis in original)
(footnote omitted)
375 U.S. at 165-66.

Subsection (3) ignores all these rights and should be declared unconstitutional.

B. If Subsection (3) is Judged by Plea Bargaining Standards, it Still Cannot Withstand Scrutiny

The breadth of constitutional guarantees attendant upon sentencing proceedings similarly apply to the plea bargaining process.

Of course, it is now well recognized that plea bargaining is an "essential component of the fair administration of justice." *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). While not announcing specific procedural safeguards for plea bargaining, the court in *Santobello* was not unmindful that procedural due process must attach to this important cog in the criminal justice system, 404 U.S. at 262:

This phase of the process of criminal justice, and

> the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonaly due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise of agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

In *Cooper v. United States,* 594 F. 2d 12, 16-17 (4th Cir. 1979), the court stated that plea bargaining requires at least those rights to "fundamental fairness embraced by substantive due process guarantees" and the right to effective assistance of counsel. And, the court in *Cooper* pointed out that an even broader interest must guide us in formulating plea bargaining principles, 594 F. 2d at 20:

> At stake is the honor of the government (,) public confidence in the fair administration of justice, and the efficient administration of justice."

Reducing the plea bargaining to a scenario in which the defendant is compelled to fully cooperate in exchange for only a hope that the prosecutor will move the court to grant him a benefit in return, coupled with the nonreviewable nature of the prosecutor's closed door decision, not only abrogates constitutional underpinnings of plea bargaining, but concommitantly undermines the integrity of the entire judicial system. Subsection (3) drives the plea bargain out of the sunshine this Court has provided in the Rules of Criminal Procedure and back at least into the "shadows from which it has so recently emerged". *Borderkircher v. Hayes,* 434 U.S. 357, 365, 98 S. Ct. 663, 54 L. Ed. 2d 604, 612 (1978); *see also Blackledge v. Allison,* 431 U.S. 63, 76, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).*

* The State has rested its case on a plea bargaining rationale. Therefore, its occasional reliance on *Greenholtz v. Nebraska Prison*

C. Finally, Subsection (3) Must be Condemned Because it Provides the Prosecution a Unilateral Forum and Denies Defendants Access to the Courts.

The denial of procedural due process is made complete by giving the State unilateral access to the courts. *See United States v. Simmons,* 537 F. 2d 1260 (4th Cir. 1976); *see generally Wardius v. Oregon,* 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973). Since a defendant is barred from petitioning the court on his own motion, Section 893.135(2), Fla. Stat. (1979); Fla. R. Crim. P. 3.800(b), and is excluded from participation in the determination under Subsection (3), he is given no right to seek redress for any wrong suffered by him if the State fails to bring to the attention of the Court whatever "substantial assistance" he has provided. This denies him the right to petition the government for redress of grievances, specifically by seeking access to the court system, a right secured by both the State and federal Constitutions. Art. I, Section 5, Fla. Const.; U.S. Const. amend. I and XIV; *Cruz v. Beto,* 405 U.S. 319, 321, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972); *Johnson v. Avery,* 393 U.S. 483, 485, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969); *Ex Parte Hull,* 312 U.S. 546, 549, 61 S. Ct. 640, 85 L. Ed 1043 (1941); *cf. California Transport v. Trucking Unlimited,* 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1971). Moreover, our State Constitution specifically commands that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, Section 21, Fla. Const. Subsection (3) defies that concept.

Inmates, U.S., 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) should be ignored. Subsection (3) does not even pretend to establish a parole release procedure. See Art. IV, §8, Fla. Const.; Ch. 947, Fla.Stat. (1979)

V.

THE TERMS OF THE "SUBSTANTIAL ASSISTANCE" PROVISION ARE ENTIRELY TOO VAGUE AND SUBJECTIVE TO SUPPORT THE POST-CONVICTION PLEA BARGAINING PROCESS THEY ARE SUPPOSED TO ENACT.

The "substantial assistance" provision for escaping the mandatory sentences of the trafficking law suffers from "the vice of vagueness." *See generally, Grayned v. Rockford,* 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 170, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); *United States v. Evans,* 333 U.S. 483, 68 S. Ct. 634, 92 L. Ed. 823 (1943); *Locklin v. Pridgeon,* 30 So. 2d 102 (Fla. 1947); *Brock v. Hardie,* 154 So. 690 (Fla. 1934); *State v. Llopis,* 257 So. 2d 17 (Fla. 1971); *Franklin v. State,* 257 So. 2d 21, 25 (Fla. 1971); *State v. Wershow,* 343 So. 2d 605 (Fla. 1977); *D'Alemberte v. Anderson,* 349 So. 2d 164 (Fla. 1977); *Brown v. State,* 358 So. 2d 16 (Fla. 1978); *Sandstrom v. Leader,* 370 So. 2d 3, 5 (Fla. 1979); *State v. DeLeo,* 356 So. 2d 306 (Fla. 1978); *High Ridge Management Corp. v. State,* 354 So. 2d 377, 380 (Fla. 1977); *Delta Truck Brokers, Inc. v. King,* 142 So. 2d 273 (Fla. 1962). The provision lacks sufficient definiteness to satisfy the plea bargaining function it is supposed to achieve. This is exacerbated, of course, by the lack of procedural safeguards.

To begin with, we find both the State Attorney's and the Judge's responsibilities cast in the discretionary "may". Assuming, however, that binding obligations are placed upon prosecutors by this directory language, how is the performance to be measured? The defendant can attempt to render "substantial assistance" as an informant, but who can say whether or not he has succeeded? Surely not Webster's dictionary. The words place unfettered discretion in the hands of the prosecutor. Given the vagaries of the informer's role and the subjectivity of assessing a concept like "substantial

assistance", how can the defendant, the prosecutor or the judge reall say that any standard has been met? *See, e.g., State v. Hargis,* 328 So. 2d 479 (Fla. 1st DCA 1976).

To conclude, Subsection (3) leaves "the liberty of every man in the hands of every petty officer". See *Stanford v. Texas,* 379 U.S. 476, 481-82, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965) (quoting James Otis). And, it leaves post-conviction "plea bargaining" in an utter morass.

VI.

EVEN IF THIS STATUTE COULD BE CHARACTERIZED AS SERVING A LEGITIMATE PENOLOGICAL PURPOSE, IT MUST BE CONDEMNED BY THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

On this point, the Appellees hereby adopt Argument IV, pp. 29-31, of the "Brief of Daniel Cowgill By Permission of the Court."

VII.

THE TRAFFICKING STATUTE VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS.

Appellees adopt Argument I, pp. 4-23, of the "Brief of Daniel Cowgill by Permission of the Court" on this point. In addition, we add the following.

The Supreme Court has held the prohibition against cruel and unusual punishment also sets the "substantive limits of what can be made criminal and punished as such," *Ingraham v. Wright,* 430 U.S. 651, 667, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1971), thus enunciating that for some "crimes" any punishment at all would be cruel and unusual. This principle finds applicability to Section 893.135.

Under Section 893.135, each defendant, regardless of his individual culpability or character or prior record,

will face the same mandatory minimum sentence, unless he waives his constitutional right to remain silent. Each defendant, regardless of his potential for rehabilitation is ineligible for parole until the termination of the mandatory minimum term -- unless he waives his privilege against self-incrimination -- regardless of the myriad factors in mitigation which might be present in individual cases. And here, most importantly, each defendant, regardless of whether he has or knows of "accomplices, accessories, co-conspirators or principals," indeed regardless of whether he can and/or wishes to provide assistance that may or may not be "substantial", can only receive individual sentencing consideration by the use of Subsection (3). As such, this statute effectively constitutes a punishment not for the crime of trafficking in cocaine, but the "crime" of asserting the privilege against self-incrimination or having no substantial assistance to give.

The Supreme Court in *Robinson v. California,* 370 U.S. 660, 667, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), reviewed a provision of California's Health and Safety Code, Section 11721, which provided for a 90-day imprisonment of anyone found addicted to narcotics. Holding that punishment of the "crime" of being a drug addict exceeded the power of the State to prescribe what can be made a crime and punished as such, the Court stated:

> To be sure imprisonment for ninety days is not, in the abstract, a punishment which is either cruel of unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.

In addition, the Court in *Robinson* acknowledged that the State had a legitimate interest in curbing the spread of drug addiction, and could further this interest by several means, save for punishing addiction as a crime.

Here, too, the length of the mandatory sentence is

irrelevant when one considers conduct it punishes: the assertion of the privilege against self-incrimination or the failure to have any substantial assistance to offer. The assertion of the privilege cannot be punished in the first instance (see discussion at pp. 15-16, 22-27, *supra*); to punish one's failure to have any "substantial assistance" to give constitutes a punishment for a "status" a defendant has no more control over than he would if he had a common cold. *Robinson v. California, supra.*

Moreover, there are countless ways that the State of Florida may accomplish its desire to gain evidence without offending the Constitution. It may provide for a larger tax base in order to fund special investigative units or a larger staff of prosecutors. It may resort to its normal investigative procedures and, when encountering an individual who may have "substantial assistance" to provide, offer him a grant of immunity and compel his testimony. It may not, however, use the punishment of mandatory, non-individualized draconian sentences to punish the failure of a defendant to waive his privilege against self-incrimination. "Lifting the lot of the prosecutor is no answer to the claim that a constitutional right is violated." *State v. Buchman,* 361 So. 2d 692, 699 (Fla. 1978).

Those who are incapable of meeting Subsection (3)'s requirement of "substantial assistance" because they simply lack information, have not committed any act or engaged in any behavior which should subject them to a mandatory minimum sentence without the right to reduction. This kind of treatment exceeds the bounds of a legislature's power to create crimes and punish them.

So, too, the privilege against self-incrimination is the "kind of conduct that cannot constitutionally be punished in the first instance." *United States v. U.S. Coin and Currency,* 401, U.S. 715, 723, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971). That the privilege stands as a bar to punishing a crime is by no means a novel idea. An entire constellation of crimes have been invalidated based upon this proposition. *Marchetti v. United States,* 390 U.S. 39,

88 S. Ct. 687, 19 L. Ed. 2d 887 (1968) (privilege is a complete defense to prosecution for failure to comply with the Federal gambling registration and tax statutes); *Grosso v. United States,* 380 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968) (same); *United States v. U.S. Coin and Currency,* 401 U.S. 715, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971) (privilege is bar to prosecute in forfeiture proceedings); *Haynes v. United States,* 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968) (privilege a bar to prosecute under the Firearms Registration Act); *Leary v. United States,* 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57, (1969) (privilege complete defense to failure to record and pay transfer tax under Marijuana Tax Act); *United States v. Covington,* 395 U.S. 57, 89 S. Ct. 1559, 23 L. Ed. 2d 93 (1969) (same). *Accord, Harrington v. United States,* 444 F. 2d 1190 (5th Cir. 1970); *United States v. Goldbert,* 426 F. 2d 285 (5th Cir. 1970); *Thompson v. United States,* 421 F. 2d 174 (5th Cir. 1970).

Since the statute exceeds the "substantive limits of what can be made criminal and punished as such," *Ingraham v. Wright,* 420 U.S. 651, 667, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1971), it violates Article I, Section 17 of the Constitution of the State of Florida and the Eighth and Fourteenth Amendments to the United States Constitution, and cannot stand.

VIII.

THE APPELLEES HAVE STANDING TO TEST THE CONSTITUTIONALITY OF THIS STATUTE AND THE CASE IS RIPE FOR PRETRIAL ADJUDICATION

In its brief, the Appellant has raised for the first time a challenge to Appellees' standing to attack Section 893.135 on its face. The State's argument lacks constitutional dimension. The "Case or Controversy" requirement imposed by the United States Constitution upon the federal courts does not extend to the courts of the State of Florida. *Sheldon v. Powell,* 128 So. 258 (Fla. 1930). The Florida Supreme Court has, however,

seemingly adopted this requirement as a prudential matter. *See, e.g., Sandstrom v. Leader,* 370 So. 2d 3, 4 (Fla. 1979). The Appellant's failure to raise this issue timely is fatal. *See, e.g., Craig v. Boren,* 429 U.S. 190, 193, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); *Singleton v. Wulff,* 428 U.S. 106, 123-24, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).

Although this should dispose of the issue entirely, Appellees will answer the State's claim.

The Appellees do have standing to challenge the constitutionality of the statute under which they have been charged (R 1-3), and to which they have entered pleas of not guilty (R4). Such standing attached at the time the charges were brought against them. *See Griswold v. Connecticut,* 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Each provision of the statute they assail are mandatory, (Section 893.135(1), (2), and (3), so their exposure to injury is absolute. Under any hypothetical posture this case might have taken had it proceeded to trial, the statute's unconstitutionality is and would have directly affected the defendants. *Cf. Wardius v. Oregon,* 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973). If they wish to plea bargain, they must access the potential liability they are exposed to; if they wish to direct their attorney to raise costly collateral issues, they must weight the cost of these expenses against the cost of incarceration. Even if they are patently innocent and sure to prevail on the merits at trial, they will be stigmatized by a permanent felony arrest record and may subject to all kinds of potential collateral injuries thereby. As such, their constitutional rights are being "adversely affected" and their "personal stake" in the controversy is substantial. *Sandstrom v. Leader,* 370 So. 2d 3, 4 (Fla. 1979).

Appellees properly asserted that their privileges against self-incrimination were being infringed upon by the operation of the statute under which they were charged by pre-trial motion (SSR 1-9). The proper time to challenge the unconstitutionality of the statute under

which a defendant has been charged in the Florida criminal case is pre-trial, by a motion to dimiss. Fla. R. Crim. R. 3.190.

In *United States v. Covington,* 395 U.S. 57, 89 S. Ct. 1559, 23 L. Ed. 2d 94 (1969), the Supreme Court, faced with an appeal by the government from a finding upon a pre-trial motion that the Fifth Amendment privilege was a complete defense to the Marijuana Tax Act, upheld the timeliness of the dismissal. It reasoned that since the question whether a person faces a risk of self-incrimination "create[s] a legal presumption", and is a question of law which if usually resolved without the necessity of inquiring into the facts, the question was properly before the Court pre-trial. In the instant case, the State has offered no factual evidence to rebut this presumption.

Statutes which represent coercive schemes seeking to exact a waiver of the privilege by threat of penalty, as the one involved in the instant case, are unconstitutional on their face. *Lefkowitz v. Cunningham,* 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977); *Lefkowitz v. Turley,* 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973); *Gardner v. Broderick,* 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968); *Sanitation Men v. Sanitation Comm'r.,* 392 U.S. 280, 284, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968).

The impermissible vagueness of Subsection (3) and lack of procedures contained therein to guide its application cannot be avoided by narrow construction, *see, e.g., Brown v. State,* 358 So. 2d 16 (Fla. 1978). The statute therefore is properly challenged for its vagueness upon its face. *Sandstrom v. Leader,* 370 So. 2d 3, 5 (Fla. 1979).

Further, since the excessive length of the mandatory minimum sentences imposed by Section 893.135(1) are predicated upon an impermissible State interest in imposing criminal penalties represented by Subsection (3), Appellees' right to be protected against cruel and unusual punishment has been compromised. They therefore have standing to attack the statute, even if

Subsection (3) has no operation or deleterious effect upon them. *Spinkellink v. Wainwright,* 578 F. 2d 582, 612 n. 36 (5th Cir. 1979).

As Subsection (3) cannot be severed from the remainder of the statute without frustrating the clear intent of the legislature, (as previously demonstrated in Argument I), appellees may raise their challenge to its constitutionality, even if there is no possible way their conduct or their rights may be affected thereby. *United States v. Raines,* 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); *Dorchy v. Kansas,* 264 U.S. 286, 290, 44 S. Ct. 323, 68 L. Ed. 686 (1924); *Butts v. Merchants & Miners Transp. Co.,* 230 U.S. 125, 33 S. Ct. 964, 57 L. Ed. 1422 (1913). *See generally,* Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76 (1937); Sedler, *Standing to Assert Constitional Jus Tertii in the Supreme Court,* 71 Yale L. J. 599 (1962).

Whenever a fundamental right of the party is affected, directly or indirectly, by the application of a mandatory statute, a party has standing to challenge that provision without a factual showing. *Ulster County Court v. Allen,* U.S. , 99 S. Ct. 2213, 60 L. Ed. 2d 777, (1979) (mandatory presumptions may be facially attacked without a factual showing, whereas permissible presumptions must rest upon the facts in the case);* *Berger v. New York,* 388 U.S. 41, 55, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967) (New York electronic surveillance statute may be successfully challenged on its face as encroaching on Fourth Amendment guarantees without factual showing that defendant's specific circumstances

* Appellant has cited this case for the proposition that facial attacks may only be raised in First Amendment cases, but this misciteS dicta and overlooks the facts in dispute. The Court held that a permissive presumption--because it did not encroach on a constitutional right--could not be facially attacked, but that a mandatory presumption---which encroached on a defendant's constitutional right to have the prosecution prove all elements beyond a reasonable doubt--could be facially challenged without a factual showing that evidence in the case would not have proven the ultimate facts underlying the presumption to the jury's satisfaction. Further, this court has held contary to Appellant's assertion. *Sandstrom v Leader, supra.*

were within the complained encroachment); *Aptheker v. Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992, (1964) (encroachment on fundamental right to travel invalidated Section (6) of Subversive Activities Control Act on its face). *See also, Sandstrom v. Leader,* 370 So. 2d 3, 5 (Fla. 1978).

The Appellees, therefore, had standing to test the constitutionality of this statute and the case was ripe for pre-trial adjudication. The trial court's order finding Section 893.135 unconstitutional is properly before the Court.

CONCLUSION

The Legislature has announced a war on drug trafficking in Florida. The chosen instrument of this was is ancient -- the rack, albeit in modern disguise. The Legislature says this was will cost nothing. Indeed, rather than properly finance an accusatorial system of justice, the Legislature has simply appropriated this Court's rule-making power and enacted a one-sided so-called post-conviction plea-bargaining procedure.

The cost, however, is imposed upon the right of silence, upon the Separaton of Powers Doctrine, upon Due Process and Equal Protection of the Laws, upon the Cruel and Unusual Punishment rights of the accused, and, ultimately Justice itself. We believe this Court should invoke what Judge Brown said in *Williamson v. United States,* 311 F. 2d 441, 445 (5th Cir. 1962) (concurring specially):

> What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough -- it is just too much. When that occurs, the laws just condemn it as offensive whether the method used is refined or crude, subtle or spectacular.

Respectfully submitted,*
[S] JOSEPH BEELER, ESQ.
Suite 900
28 West Flagler Street
Miami, Florida 33130

BRIAN RICHARD MCCOMB
1531 N.W. 15th Street Road
Miami, Florida 33125

Attorney for Appellees

* Counsel gratefully acknowledge the assistance of Laurel D. White, third year student at the University of Miami, School of Law.

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 57,834

THE STATE OF FLORIDA,

Appellant,

vs.

CARLOS M. BENITEZ and
ESPERANZA BENITEZ,

Appellees.

AN APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA IN AND FOR DADE COUNTY

BRIEF OF DANIEL COWGILL
BY PERMISSION OF THE COURT

LAW OFFICES OF PHILIP CARLTON, JR.
Attorney for Daniel Cowgill
19 West Flagler, Suite 220
Miami, Florida 33130
PH: (305) 377-1471

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STATEMENT OF THE CASE AND OF THE FACTS

On January 9, 1979 this Honorable Court granted DANIEL COWGILL, Appellant in CASE NUMBER

58,199 before this Court, permission to file a brief in this cause. Mr. Cowgill's brief will be in support of the proposition that Section 893.135 Florida Statutes is unconstitutional. Mr. Cowgill accepts the statement of the case and of the facts as presented by the parties to this cause.

QUESTIONS PRESENTED

I

WHETHER SECTION 893.135 FLORIDA STATUTES IS CRUEL AND UNUSUAL AND THUS VIOLATES THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION SEVENTEEN OF THE CONSTITUTION OF THE STATE OF FLORIDA.

II

WHETHER SECTION 893.135, FLORIDA STATUTES PENALIZES THE EXERCISE OF THE RIGHT TO SILENCE AND THUS VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION NINE OF THE CONSTITUTION OF THE STATE OF FLORIDA.

III

WHETHER SECTION 893.135(3), FLORIDA STATUTES COERCES SELF-INCRIMINATION WITHOUT AFFORDING IMMUNITY FROM PROSECUTION AND THEREFORE VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION NINE OF THE CONSTITUTION OF THE STATE OF FLORIDA.

IV

WHETHER SECTION 893.135(3), FLORIDA STAT-

UTES FAILS TO AFFORD EQUAL PROTECTION OF THE LAW MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

V

WHETHER SECTION 893.135(3), FLORIDA STATUTES FAILS TO PROVIDE DUE PROCESS OF LAW MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION NINE OF THE CONSTITUTION OF THE STATE OF FLORIDA.

VI

WHETHER SECTION 893.135(3), FLORIDA STATUTES IS UNCONSTITUTIONAL FOR IT VIOLATES THE SEPARATION OF POWER CLAUSE OF ARTICLE II, SECTION THREE OF THE CONSTITUTION OF THE STATE OF FLORIDA.

VII

WHETHER SECTION 893.135(3), FLORIDA STATUTES IS UNCONSTITUTIONAL FOR IT PROVIDES FOR THE IMPOSITION OF SENTENCE OF IMPRISONMENT BY AN ADMINISTRATIVE AGENCY IN VIOLATION OF ARTICLE I, SECTION EIGHTEEN OF THE CONSTITUTION OF THE STATE OF FLORIDA.

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AND 3.180.

IX

WHETHER SECTION 893.135(3), FLORIDA STATUTES IS NOT SEVERABLE.

ARGUMENT I

SECTION 893.135, FLORIDA STATUTES IS CRUEL AND UNUSUAL AND THUS VIOLATES THE EIGHTH AMENDMENT TO THE CONTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION SEVENTEEN OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The Florida Statute is cruel and unusual for it precludes the exercise of discretion as mandated by recent decisions of the Supreme Court of the United States.

The Supreme Court of the United States in *Woodson v. North Carolina,* 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944, (1976) and *Roberts v. Louisiana,* 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976) held that where state statutes mandate the death sentence upon conviction of particular crimes, such statutes violate the Eighth Amendment of the Constitution of the United States prohibiting the cruel and unusual punishment because the exercise of discretion by the Court and by the jury is precluded although the decisions in these two cases were made in reference to statutes mandating the death penalty, the principles upon which the decisions were based should not be so restricted. Rather, the principles may be applied to "mandatory" sentencing statutes generally.

Chief Justice Berger expressed strong opposition to mandatory death sentence statutes because such statutes precluded jury discretion. In *Furman v. Georgia,* 92 S. Ct. 2726 (1972). Chief Justice Berger stated by way of dicta,

It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them. *I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution.*

As the concurring opinion of Mr. Justice MARSHALL shows, *ante,* at 2777, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measures by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. See *Winston v. United States,* 172 U.S. 303, 19 S. Ct. 212, 43 L. Ed. 456 (1899); cf *Calton v. Utah,* 130 U.S. 83, 9 S. Ct. 435, 32 L. Ed. 870 (1899). See also *Andres v. United States,* 333 U.S. 740, 753, 68 S. Ct. 880, 886, 92 L. Ed. 1055 (1948). (Frankfurter, J. concurring). (Emphasis added).

The Court in *Woodson v. North Carolina, supra,* stated that contemporary values required that individual circumstances be considered by the jury in the exercise of its discretion. The Court cited the following statement which appeared in *Williams v. New York,* 69 S. Ct. 1079 (1949).

The belief no longer prevails that every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from period in which the death sentence was an automatic and common place result of convictions.

Justice Blackmun shares this view. In *Furman v. Georgia, Supra,* he stated:

> That legislation requiring automatic death sentences would "regressive and of an antique mold" and would mark a return to point in our criminology (passed beyond) long ago.

The Court stated that the prohibition, by mandatory death statutes of "particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition upon him of a sentence of death" violates the constitution. "It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death." The Court stated:

> This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 55, 58 S.Ct. 59, (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams v. New York,* 69 S.Ct. 1079, 1083-1084, (1949); *Furman v. Georgia*, 92 S.Ct., at 2810-2811 (Burger, C.J., dissenting..).

The degree to which the Supreme Court of the United States is opposed to mandatory sentences is disclosed rather dramatically in *Gardner v. Florida,* 97 S. Ct. 1197 (1977), where the Court held that even though the statute provided for the exercise of discretion rather than a mandatory sentence, that the procedure employed

violated *Woodson v. North Carolina, supra.* Justice White stated:

> The issue in this case, like the issue in *Woodson v. North Carolia, supra,* "involves the procedure" employed by the State in selecting persons who will receive the death penalty. Here the sentencing judge indicated that he selected petitioner *Gardner* for the death penalty in part because of information contained in a presentence report which information was not disclosed to petitioner or to his counsel and to which petitioner had no opportunity to respons. A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the "character and record of the individual offender" fails to meet the "need for reliability in the determination that death is the appropriate punishment" which the court indicated was required in *Woodson.*

The most recent cases decided by the Supreme Court of the United States reaffirm the holding in *Woodson v. North Carolina, supra.* A statute providing for the mandatory death sentence for rape was held to be unconstitutional. *Coher v. Georgia,* 433 U.S. 584, 97 S. Ct. 286, 53 L. Ed. 2d 982.

In *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 937 (1978) the court held that where the trial court was limited to a closed list of mitigating factors and thus could consider nothing in mitigation which was not listed, was an unpermissible limitation on the exercise of discretion and thus unconstitutional. This most recent case is also the strongest. Heretofore, the Court had invalidated statutes which precluded the exercise of discretion. In *Lockett v. Ohio, supra,* the Court invalidated a statute which specifically provided for the exercise of discretion but limited the factors to be considered in mitigation.

Thus the exercise of discretion is constitutionally

required, *Woodson v. North Carolina, supra; Roberts v. Louisiana, supra, Coher v. Georgia, supra,* and *Lockett v. Ohio, supra.*

In spite of the above decisions of the Supreme Court of the United States, the Supreme Court of Florida in *McArthur v. State,* 351 So. 2d 912 (Fla. 1977) held that a statute providing for a life sentence without parole for twenty-five years upon conviction for first degree murder was valid. The Court stated that the constitutional mandate of *Woodson v. North Carolina* and *Roberts v. Louisiana,* applied only to death sentences.

The reasoning of the Supreme Court of Florida appears to be supported by the following language in *Woodson v. North Carolina, supra:*

> This conclusion (individualization is constitutionally required) rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. At P. 2991.

This statement of course, does not preclude that application of the principles of the case to non-death sentences. The above statement correctly indicate that the principles apply with greater force to death cases, but no where does the Court engage in dicta which would preclude broader application. The principles used by the Court are in no way peculiarly related to the death sentence and thus limited thereto. The Court was confronted with death penalty statutes. It's decision is limited to death penalty statutes. It cannot be construed to preclude wider application, but it may be construed to permit wider application.

The argument for application of the principle to non-capital cases if supported by the following language in the same opinion:

> The need for treating each defendant in a capital case with that degree of respect due the

> uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques - probation, parole, work furloughs, to name a few - and various post conviction remedies, may be available to modify an initial sentence of confinement in non-capital cases. *The nonavailability of corrective or modifying mechanisms with respect of an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.* (Emphasis added).

Thus the obvious conclusion is that statutes requiring mandatory terms may be unconstitutional for such statutes preclude the possibility of parole and other "modifying mechanisms" to ameliorate the original sentence.

The Supreme Court of Florida did not have the benefit of *Lockett v. Ohio, supra,* when *McArthur v. State, supra,* was before them.

Florida jurists have recognized that the exercise of discretion is constitutionally required in non-capital cases.

In *Quick v. State,* 432 So. 2d 850 (Fla. 2d DCA 1977), the dissenting opinion stated:

> But in my view, a twenty-five year sentence without hope of parole for such a period and without discretion to consider and give effect to strong mitigating factors as they relate to current standards of decency, retribution and mercy, transcends constitutional tolerance under the same rationale upon which the United States Supreme Court relied in avoiding mandatory, non-discretionary death sentence in *Woodson v. North Carolina.*

The majority did not address the above argument. The court affirmed the conviction and sentence stating: "--- The issue is for legislative rather than judicial

involvement".

When the issue of the constitutionality of the portion of the statute prohibiting parole for twenty-five years was before the Supreme Court of Florida, the court returned the cause to the District Court of Appeal, *Peak v. State,* 363 So. 2d 1166 (Fla. 3d DCA 1978) stating:

> It appearing to the Court that the Appeal presents no substantial constitutional question, therefore, pursuant to Florida Appellate Rules, it is ordered that this cause be transferred to the District Court of Appeal.

Three justices dissented and the majority of four qualified the order by stating that no "substantial" constitutional question was present.

To the writer's knowledge the only other experience Florida Courts have had with with issue of the Constitutionality of mandatory sentences was *Sowell v. State,* 342 So. 2d 969 (Fla. 1977) and *State v. Opitz,* 357 So. 2d 469 (Fla. 2d DCA 1978). In the former the Supreme Court of Florida held that Section 773.087(2) providing for a three year mandatory term where the accused is convicted of committing certain crimes while in possession of a firearm was not cruel and unusual on its face. The Court did not discuss the issue and specifically did not discuss the constitutional mandate of the exercise of discretion. The latter case, without discussion, followed the former.

Mr. Cowgill urges that the requirement of the exercise of discretion is not limited to capital cases. Rather its application is universal and applicable to any sentence. It is a well known principle of law that the trial court has a positive duty to exercise its discretion and thus any sentence, capital or otherwise, may be reversed when the trial court failed to exercise discretion. In *United States v. Williams,* 407 F. d 940 (4th Cir. 1969) the record showed that the defendant, convicted of forgery, was a narcotic addict. The Court failed to exercise its discretion as to whether the defendant should be granted

the benefits of sentence under the Narcotic Addict Rehabilitation Act. The cause was remanded to enable the Court to determine whether the defendant was entitled to treatment.

In *United States v. Wilson,* 450 F. 2d 495 (4th Cir. 1971) the Court stated that on appeal a sentence may be reviewed to determine whether the court below in fact, exercised its discretion and remanded the cause, where the defendant had been sentenced to three years for forgery, for consideration for whether the defendat should have had the benefit of the Youth Corrections Act.

Thus it is abundantly clear that the requirement that discretion be exercised in sentencing, is not limited to death sentences but rather has universal application.

The view that exercise of discretion required by *Woodson* should not be limited to death sentences, is supported by the policy that individualization of all sentences is an important element of the sentencing process.

The Supreme Court of the United Stated has stated:

It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration of each offender which would be possible only in the exercise of a broad discretion. *Burns v. United States,* 287 U.S. 216, 220 (1932).

The Supreme Court in a later case stated:

For the determination of sentences justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the *offense together with the character and propensities of the offender. Commonweath of Pennsylvania ex. rel. Sullivan v. Ashe,* 302 U.S. 51, 55 (1937).

More recently, the Florida Supreme Court held, in *Davis v. State*, 123 So. 2d 703, 711 (Fla. 1960), cited with approval in *Walker v. State*, 296 So. 2d 27 (Fla. 1974):

> Crime must be punished, but it is the consideration of the individual that should determine the kind of treatment appropriate to his case. Responsibility should be the basis of punishment and individualization the criterion; such is the formula for modern penal law.

California courts have held that the requirement of discretion is not limited to death sentences. The court in *In re Foss*, 519 P. 2d 1073 (Calif. 1974) held that a sentence precluding the consideration of parole for ten (10) years was cruel and unusual.

In *In re Grant*, 553 P. 2d 590 (Calif. 1976) the court was presented with the issue of whether a particular statute prohibiting the consideration of parole for ten years was unconstitutional. The Court did not limit itself to that particular statute but rather reviewed the array of similar statutes. The court stated:

> In light of the multiplicity and similarity of recidivist provisions for enhanced minimum prison terms, piecemeal review of each such provision is counterproductive. Furthermore, because of the graduated penalty feature of these provisions, the invalidation of a particular provision precluding parole consideration based on multiple prior convictions may create the anomalous situation whereby offenders with only one prior conviction are subject by statute to longer terms before eligibility for parole than persons convicted of the same offense with two or more priors. We undertake, accordingly, to review the entire scheme of Health and Safety Code provisions precluding parole consideration for recidivist narcotics offenders.
>
> We concluded that those provisions of the

> Health and Safety Code which preclude parole consideration for a minimum of five years or more for recidivist narcotics offenders constitute both cruel and unusual punishment in violation of California constitutional proscriptions. (People v. Foss, supra, 10 Cal. 3d 910, 929, 112 Cal. Rptr. 649, 519 P. 2d 1073).

Similarly, the California Supreme Court, in granting habeas corpus relief to a prisoner, held a sentence invalid because "not only does the punishment here fail to fit the crime, it does not fit the criminal." *In Re Lynch,* 503 P. 2d 921, 939 (Cal. 1973).

> Further, the Standard Probation and Parole Act states:
>
> This Act shall be liberally construed to the end that the treatment or persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs and potentialities as revealed by case study, National Council on Crime and Delinquency, Standard Probation and Parole Act, §1 (1955).
>
> Moreover, the Model Penal Code states, as one of its purposes, differentiating among offenders with a view to just individualization of their treatment. Model Penal Code, Section 1.02(e) 1962).

In Summary:

1. The constitutional mandate of discretion has not been limited by the Supreme Court of the United States to death sentences. In fact, the language of *Lockett v. Ohio, supra,* indicates that the mandate could extend to all cases where the "corrective or modifying mechanisms" are not available. Of course, such mechanisms are not available in mandatory sentences for the length of the term.

2. The holding of the Supreme Court of Florida in *McArthur v. State,* that the constitutional mandate applied only in death cases was decided before *Lockett v.*

Ohio, supra, appeared and available to the court.

3. The decision of the Supreme Court of Florida in *McArthur v. State* is not germaine to the Florida Statute in issue because:

(a) *McArthur v. State,* was concerned with a statute which prohibited any discretion. The legislature had decided that the crime of murder is so heinous that the exercise discretion was not needed.

(b) In the instant case, the legislature has not determined that trafficking is so heinous that no discretion is needed. To the contrary the statute provides that if the state attorney so recommends, the court many consider aggravated and mitigating circumstance and in the exercise of its discretion sentence the accused to a non-mandatory term. However, in a person who is a first offender, and has no information to offer the state attorney, the state attorney may not recommend that the court exercise discretion as to him. The least culpable defendant, the defendant most deserving of discretionary consideration is precluded. Thus where the legislature recognized the need for the exercise of discretion, and afford the possibility to the more culpable and excluded the least culpable, the statute mandates cruel and unusual punishment. *Woodson v. North Carolina, supra; Roberts v. Louisiana, supra; Lockett v. Ohio, supra.*

It should not be overlooked that discretion is also precluded for the length of the mandatory term. No matter what evidence developes during incarceration that shows that continued incarceration is not productive, would be counter productive, and is unnecessary and therefore cruel and unusual, the discretion ordinarily exercised by the Parole and Probation Commission is denied the least culpable defendant. This is by far the greater abuse and the greater cruelty.

The Florida Statute is cruel and unusual for the mandatory sentence is unnecessarily severe.

Appellee argues that the Supreme Court of the United States has never held a statute to be cruel and unusual

because of the length of the terms provided. That is true, but the Supreme Court has never ruled that such an argument is untenable. *Weems v. United States,* 217 U.S. at 368, 30 S. Ct. at 549. Lower federal courts and state courts have ruled statutes to be cruel and unusual because the terms were too severe.

In *People v. Lorentzen,* 194 N.W. 2d 827 (Mich. 1972) the court held that a statute providing for a twenty year minimum sentence for sale of a narcotic drug to be cruel and unusual. The court recognized the principle that excessive punishment is cruel and unusual and found the punishment disproportionately severe when related to punishment provided by Michigan statutes for other crimes.

In *Davis v. Zahradnick,* 432 F. Supp. 444 (1977) * the court reversed two sentences imposed by a state court of twenty years to run consecutively for sale of about nine ounces of marijuana. The court first held a sentence authorized by the statute may be cruel and unusual although such a sentence might be appropriate for a different defendant under different circumstances. The court then stated that "excessiveness is the hallmark of cruel and unusual punishment" citing *Gregg v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 929 (1976). The court them analyzed the nature of the offense, and the offender, the purpose of the legislature, the punishment as related to other jurisdictions, the punishment as related to other crimes in the same jurisdiction, and held the sentence to be cruel and unusual.

Such an analysis of the instant compiles the same conclusion. The court in *In re Grant, supra,* found the California penalty to be more severe than the provided in 92% of the other states and the Florida penalty exceeds the California. Within Florida only capital and life felonies (crime of violence and/or danger) provide more severe penalties.

*Davis v. Davis, Affirmed en banc 601 F.2d 153 (4th Cir. 1979).

The scheduling of penalties of the Florida statute is as follows:

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences.---

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking of cannabis," If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentences to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s. 893.03(2)(a), is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a

mandatory minimum terms of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constuctive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

The argument that the statute is cruel and unusual because the punishment is excessive is made all the more powerful in light of the fact that the punishment may be imposed without the exercise of discretion and applied to the least culpable defendant.

Two additional concepts should be considered with respect to the Florida Constitution. The federal constitution prohibits cruel and unusual punishment. The Florida constitution prohibits cruel or unusual

punishment. Thus a statute may violate the Florida constitution because it is disproportionate to the usual penalties for the crime in other jurisdictions and disproportionate to punishment for other crimes in same jurisdiction. This argument was approved in *People v. Lorentzen, supra,* where the Michigan constitution prohibits cruel and unusual punishment.

Justice Brennan in an article entitled *State Constitutions and the Protection of Individual Rights,* 90 Harv. L.R. 484 (1977) stated, that a state may construe its own laws and constitution so as to guarantee its citizens more protection that federal provisions, even those identically phrased.

Expressing the same position Judge Adkins in *Nowlin v. State,* 346 So. 2d 1020 (Fla. 1977) proposed that the rule in *Harris v. New York,* 91 S. Ct. 643 (1971) is not binding in Florida because a state is free to impose greater restriction on its own laws that the restrictions imposed by the Supreme Court of the United States. Judge Adkins Stated:

> It is time that we reaffirm the independent nature of the Florida Constitution and assume our responsibility to define and protect the rights of Florida citizens, despite conflict in decisions of the United States Supreme Court interpreting the Federal Constitution. Reasonable (illegable) can and do differ about the balance to be struck between "liberty" and "order." Swinging to the "order" side in this case will not only infringe upon the "liberty" of our citizens, but create a chaotic trial problem.
>
> I am motivated to agree with *Harris* because of my abhorrence of the possibility of my perjured testimony, although as a former trial judge, I recognize that defendant in criminal actions are prone to commit a "little" perjury when their life of libery is at stake. I do not condone such conduct. On the other hand, I could not conceive that

evidence obtained in flagrant violation of *Miranda* should ever be presented to a trier of fact. *Miranda* articulates a simple, workable rule which is still the law of this land, This rule can be abrogated by police officers when they ignore their duty to give the simple warnings prescribed in Miranda, knowing full well that the illegally obtained statements may be admissible for impeachment purposes if a defendant elects to testify. The rights of our citizens under our State constitution should not be impaired when police officers ignore a duty imposed upon them by the United States Supreme Court and this court.

Other courts have rejected *Harris* on state constitutional grounds. *People v. Disbrow,* 16 Cal. 3d 101, 127 Cal. Rptr. 360, 545 P. 2d 272 (1976); *State v. Santiago,* 53 Haw. 254, 492 P. 2d 657 (1971).

Academic reaction to *Harris* has in general been strongly critical. See, e.g., *Dershowitz & Ely, Harris v. New York: Some Anxious Observations* (1971) 80 Yale L.J. 1198; Note, *Harris v. New York: The Retreat from Miranda* (1972) 32 La.L.Rev. 650; Note (1971) 40 Fordham L.Rev. 394; Note (1972) 83 Harv. L.Rev. 44; Note (1971) 24 Vand.L.Rev. 843; Note (1971) 39 Geo.Wash.L.Rev. 1241; Note (1973) 73 Colum.L.Rev. 1476).

We should assert an independence in construing the State constitution so as to maintain stability in the law and protect individual rights.

Under the constitution of the State of Florida, State should not be allowed to impeach a defendant with statements made by him to officers who have failed to give him the warnings required by this Court.

The statute violates the Eighth Amendment of the

Constitution of the United States and Article One, Section Seventeen of the Constitution of the State of Florida.

ARGUMENT II

SECTION 893.135, FLORIDA STATUTES PENALIZES THE EXERCISE OF THE RIGHT TO SILENCE AND THUS VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE ONE, SECTION NINE OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Section 893.135(2) and (3) states:

> (2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt of imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.
>
> (3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendent rendered such substantial assistance.

In order to qualify for discretionary consideration under the subsection (3) the defendant must forego his

right to silence and afford the prosecution "substantial" assistance. The government may not penalize a person for exercising his right to silence. This principle has been applied to the right to silence in diverse cases that range from the right to silence at arrest [*Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 224, 49 L. Ed. 2d 91 (1963)] to the protection of employment [*Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968)].

The precise issue presented here is whether penalizing the exercise of the right to silence by severity of sentence is unconstitutional, Federal and Florida courts agree that it is.

In *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) the Court held that a statute which promoted a plea of guilty in order to decrease the severity of the sentence was unconstitutional.

In *United States v. Rodriquez*, 498 F. 2d 302 (5th Cir. 1974) the circuit court noted that the severity of the sentence might have been increased because the defendant, after the verdict was rendered, would not confess. The court vacated the sentence remanded for resentencing and stated:

> ---the defendant retains important Fifth Amendment rights after the jury reached a verdict, rights which must be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his Fifth Amendment rights or risking a harsher sentence.

The above principle was approved and applied in *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966); *United States v. Acost*, 501 F. 2d 1330 (5th Cir. 1974); *United States v. Laca*, 499 F. 2d 922 (5th Cir. 1975); *United States v. Wright*, 533 F. 2d 214 (5th Cir. 1976); *United States v. Adoivs*, 555 F. 2d 353 (3d Cir. 1977); *Bertrand v. United States*, 467 F. 2d 901 (5th Cir. 1972); *United States v. Moore*, 427 F. 2d 38 (5th Cir. 1972).

Florida, of course, applies the principle that the

exercise of the right to silence may not be penalized by severity of sentence. In *Gillman v. State*, 373 So. 2d 935 (Fla. 2d DCA 1974) the severity of the sentence was affected by the fact that the accused, in the exercise of this right to silence, refused a plea bargain and chose to be tried by a jury. In vacating and remanding for resentencing, the court stated:

> The law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.

Gillman v. State, supra, is particularly forceful because the court vacated and remanded even though there were other factors which contributed to the severity of the sentence. The court stated:

> ---and the record clearly indicated that his prior record was at least equal weight in the formulation of the sentencing judge's decision. Nevertheless, appellant's choice of plea should not have played anv part in the determination of the sentence.

The principle in *Gillman v. State, supra,* was approved and applied in *Gallucci v. State*, 371 So. 2d 148 (Fla. 4th DCA 1979).

Appellant argues that the subsection requires the defendant to implicate others, rather than himself and thus the right to silence is not violated (Appellant's brief p. 58). This argument neglects the realities. The usual case involves a conspiracy. It would be substantially impossible to affor "substantial" assistance by informing on others without the risk of self-incrimination. This point was recognized in *United States v. Acosta*, 501 F. 2d 1330 (5th Cir. 1974). The trial court had increased the severity of sentence because *Acosta* had refused to inform on others. The court vacated stating:

> ---but I am unable to see how Acosta may have implicated others without, at least tacitly admitting his own complicity.

The same circumstance obtained in *United States v. Rogers,* 504 F. 2d 1079 (5th Cir. 1974). The trial court expressed displeasure with Roger's refusal, after verdict, to disclose other members of the conspiracy and stated that a less severe sentence would not be considered unless Rogers produced "substantial" cooperation. The court vacated the sentence stating:

> Until now we have had no occasion to address ourselves to the situation sub judice, where the trial court did not ask Rogers to directly confess his guilt, but rather to "sing" about others involved in the conspiracy. But we view this as a distinction without a difference.

Thus in accordance with the principles applied by the Supreme Court of the United States, the federal circuit courts and the Florida appellate courts, cited herein, Section 893.135(3) violated the right to silence guaranteed by the Fifth Amendment to the Constitution of the United States and Article One, Section Nine of the Constitution of the State of Florida.

ARGUMENT III

SECTION 893.135(3) FLORIDA STATUTES. COERCES SELF-INCRIMINATION WITHOUT AFFORDING IMMUNITY FROM PROSECUTION AND THEREFORE VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE ONE, SECTION NINE OF THE CONSTITUTION OF THE STATE OF FLORIDA.

As previously shown the requirement of "substantial" assistance inevitably involves a degree of

self-incrimination. *United States v. Acosta, supra, United States v. Rogers, supra.* Thus Section 893.135(3) coerces self-incrimination by the threat of mandatory terms. Since the Fifth Amendment prohibits coersed self-incrimination under pain of contempt unless immunity from prosecution is afforded, self-incrimination under pain of severity of sentence is prohibited unless immunity from prosecution is afforded. *Rastigor v. United States,* 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

The Florida Statute does not provide immunity. The constitutional issue raised by the failure to afford immunity was addressed in *United States v. Garcia,* 544 F. 2d 681 (3d Cir. 1976). The court noted that implication of others was usually self-incriminating and noted that no immunity was offered under pertinent federal statute. The court citing *United States v. Acosta, supra,* and *United States v. Rogers, supra,* vacated the sentence stating:

> The appellants were put in a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellant's expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price is too high. We therefore, cannot permit the sentences to stand.

The Florida statute violates the Fifth Amendment to the Constitution of the United States and Article One, Section Nine of the Constitution of the State of Florida.

ARGUMENT IV

SECTION 893.135(3) FAILS TO AFFORD EQUAL PROTECTION OF THE LAW MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Under the Florida statute mandatory terms are required unless the prosecution recommends otherwise. Under the statute, the prosecution may not so recommend unless the defendant affords "substantial" assistance. Thus "substantial" assistance is an absolute prerequisite to the consideration of a non-mandatory term. Alone, first time offender with no connections or future plans is unable to afford "substantial" assistance. An experienced long term operator can. Thus the least culpable receive mandatory terms automatically, while the more culpable may receive the benefit of the exercise of discretion. The statute denies the least culpable equal protection of the law.

The constitutionality of the statute may not be saved by asserting that the class of those who cooperate and the class of those who do not are reasonable distinguished because (1) the least culpable is discriminated against not because he won't cooperate, but because he can't, and (2) a detrimental class distinction may not be based upon the exercise of the right to silence.

The argument that the defendant has no right to a sentence other than a mandatory term, and thus is not entitled to equal protection is unavailing. Where there is no constitutional right to appeal, but where the state provides an appellate process, an indigent has the constitutional right to free transcripts of the trial in order to avail himself of the appellate process - and that right is based upon the Fourteenth Amendment mandate of equal protection of the law. *Griffen v. Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956).

Similarly, although parole and probation are matters of grace rather than right, an accused is entitled to a due process hearing on the issue of revocation. *Gagnon v. Scarpelli,* 441 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed. 2d 484 (1972). A recent case has held that upon application for parole in the first instance the prisoner is entitled to due process. *Greenholtz v.*

Inmates of Nebraska Penitentiary, ____ U.S. ____, 99 S. Ct. 2100 (1979).

Florida law describes conditions leading to probation in Section 948.01 Florida Statutes, Section 947.18 provides for release on parole. Florida Rules of Criminal Procedure 3.800 provides for mitigation of sentence. Of course, the court may suspend sentence. Section 893.135(2) Florida Statutes provides that where the defendant does not afford "substantial" assistance, notwithstanding Section 948.01 Florida Statutes, sentence shall not be suspended and the defendant is not eligible for parole prior to the mandatory term.

Further, it is apparent that no legitimate state interest is served in denying the least culpable defendant the benefit of subsection where he gives no "substantial" assistance because he has no information to tender the state. In such an instance the defendant is penalized in violation of equal protection and substantial due process.

Appellee asserts that the statute is not a denial of equal protection citing *People v. Eason*, 386 N.Y.S. 2d 673 (1976). Reliance upon *People v. Eason* is misplaced. Under the New York statute the recommendation of the prosecutor was a condition precedent to the court placing the defendant on probation. Otherwise the full array of sentencing alternatives was open to the trial court. The court held that "so long as the statute does not wrest from the courts the final discretion to impose sentence" it was not a denial of equal protection. The Florida statute does wrest final discretion from the courts. If the prosecutor does not make recommendation, the sentence is automatically the mandatory term. The court has absolutely no jurisdiction to sentence at all. The sentence is automatically imposed by lack of recommendation and the operation of the statute-that is, by the prosecution. The Florida statute denies equal protection of the law.

ARGUMENT V

SECTION 893.135(3) FAILS TO PROVIDE DUE PROCESS OF LAW MANDATED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE ONE, SECTION NINE OF THE CONSTITUTION OF THE STATE OF FLORIDA

As described in the previous section Florida laws provides for suspension of sentence, mitigation of sentence and parole Section 948.01 Florida Statutes Section 947.19 Florida Statute. Florida Rule of Criminal Procedure 3.800. Section 893.135(3) deprives a defendant of the benefit of these laws unless the defendant has afforded "substantial" assistance. As described in the previous section, the least culpable defendant is automatically precluded for he has no information to offer. The minimal requirement of due process is a hearing, *Griffen v. Illinois, supra, Gagnon v. Scarpelli, supra, Morrissey v. Brewer, supra, Greenholtz v. Inmates of Nebraska Penitentiary, supra.* The Florida statute provides for no hearing whatsoever, and thus denies due process.

Further if the defendant does offer assistance, he is automatically, without a hearing, denied the benefits of the subsection if the assistance is not "substantial". The statute vests absolute discretion as to the determination of whether the assistance was "substantial" in the prosecution. The statute provides no guidelines for the determination of this issue. Further, even if the prosecution determines that the assistance was substantial, the prosecution is not required by the subsection to initiate recommendations to the court. Agains the prosecution has absolute discretion, and the statute contains no guidelines.

As stated in the previous section although suspension of sentence, mitigation and parole are not constitutionally mandated, where such rights are

provided by law, the defendant is entitled to due process as to their application. *Griffen v. Illinois, supra.*

In *Papachriston v. City of Jacksonville,* 405 U.S. 170, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), the court held that a vagrancy statute failed to afford due process for it provided no standard for the exercise of discretion and thus permitted discriminatory application.

The above principle has been applied directly to sentencing. In *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 345 (1972) the court held that the death penalty was unconstitutional as applied under the Georgia statute which, due to lack of standards, permitted discrimination. Appellant asserts that the infirmity of vagueness as to the elements of the crime may render the statute unconstitutional but vagueness as to the sentence will not invalidate the statute. (Appellant's brief p. 67,68) *Furman v. Georgia, supra,* answers this argument.

In the instant Florida Statute has no standards whatsoever. Rather, on its face, it permits total discretion by the prosecution and thus constitutes a denial of due process.

Further, the subsection denies due process because its terms are impermissibly vague. Although the requirement that a criminal statute be specific and certain is generally directed toward the elements of the crime, the doctrine of "vagueness" has been applied to the sentence, *United States v. Evans,* 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1943). This case involved an immigration statute which defined multiple crimes and multiple punishments. The defendants claimed that the statutory language was vague as to what punishment applied to the commission of any of the multiple crimes. The court recognized that if the terms of the statute were so vague that legislative intent could not be discerned with confidence, that the courts interpretation of the statute would in fact be substituting its views for that of the congress and thus be impermissible under the separation of powers doctrine. The court stated:

> If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply.

The legislative history of the statute shows that several members of the legislature expressed concern over the vagueness of the term "substantial".

HOUSE OF REPRESENTATIVES COMMITTEE ON CRIMINAL JUSTICE

REPRESENTATIVE SAMPLE: All right, is this mandatory if they don't cooperate? are we going to have to add some more specificity to what is cooperation, or are we just going to spell it out and say if you don't squeal?

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: Well, I have only one question to ask staff concerning--in discussing this with Mr. Haben. Where in the statute do they define the word "substantial"?

VOICE: We can define it if you want. You can define-you know, but it is going to be questionable--

REPRESENTATIVE HABEN: Mr. Chairman, can I respond to that?

MR. CHAIRMAN: Representative Haben.

REPRESENTATIVE HABEN: Representative Fontana, I raised that, because I started reading it first of all as a defense lawyer, and what could I do, you know, to get around that, but I'm afraid if you try to define what substantial is, you're going to open the box of information leading to a conviction, which is going to give you a problem, because what if the guy really does what he is supposed to do and turns state's evidence

and, for one reason or another, you end up with a hung jury, or you lose a witness during the trial, and you end up with a mistrial or the State Attorney feels that he can't press on, and the conviction doesn't occur, they you haven't satisfied the statute. So it seems to me that, even though it would be desirable to give some degree of specificity, I think if you try to do it, I think you get into a box you can't get back out of. It would be nice to do it, but if we do it, I think we're going to probably overload it.

VAGUE

HOUSE OF REPRESENTATIVE COMMITTEE P. 11,12

REPRESENTATIVE MARTINEZ: I think, really, the word "substantial", it's not even clear. The judge may have some hangups as to how far it should go. The concept is great, but unless you give that defendant something to go on so that he can at least show the court, look all I did was drive the truck and John Brown was the one that was supposed to pay me, and John Brown told me that his boss was going to have to bring him the money first. So who's his boss? I don't know. Oh, yes, you know, you just don't want to tell us, you haven't given us any help.

I bet that the intent might have been, and I think this might help the bill, and I throw it out just to think about--if, when we're talking on the last page, page 4, when ever a person is convicted or imprisoned, that refers to the guy doing the talking. He's got to be convicted or imprisoned I think, really, if you want to get at the high level, then let that conviction be of the one he ratted on. If his testimony good enough to convict him, the guy over him, then he's entitled to this, you see what I mean?

HOUSE OF REPRESENTATIVE COMMITTEE

MR. GIBSON: I want to make a couple of remarks, also want to make an introduction of Jim White.

First off, the bill is designed not to bet the mule but to get the thoroughbred. It can be interpreted to where you can go up or down the ladder, but the information has to

be substantial enough to warrant the State Attorney's filing his petition, and thereafter, consideration by the judge.

I'd recommend that the language of the statute stay as it is. If we had a particular case before us, if we knew what the facts in that case were, we could collectively decide what the best thing to do was. But we don't have the facts of a particular case before us. We have to give the authority to the State Attorney, who has the facts of that particular case before him, and trust in the good judgment of the judge who has the facts of that case before him. We would be doing ourselves a disservice I think, if we gave our law enforcement people the tools, and then by adding restrictions or making requirements on how these tools would be used, we'd, in effect, be tying one hand behind their backs, and the tools would be laying out in front of them.

We should give them the maximum discretion to determine what substantial assistance is. Like Sheriff Blackburn says, if they determine that that piece of information is not adequate, I'm not sorry for them, either. It's just not substantial enough to warrant getting out of a prison sentence of this kind for an offense of this kind.

But unless we knew what the particular facts of the case were, we'd better leave that up to the decision of the people who have the facts of that case in front of them.

It is apparent that members of the legislature were concerned about the vagueness of the term "substantial" assistance, and that some legislators preferred to leave the definition to the discretion of the state attorney in each individual case. This is analogous to the vagrancy statute declared unconstitutional in *Papachriston v. City of Jacksonville, supra,* because the definition of its terms was left with the arresting officer in each individual case.

The statute is vague and gives the state attorney total discretion--it therefore denies due process of law.

ARGUMENT VI

SECTION 893.135(3) IS UNCONSTITUTIONAL FOR IT VIOLATES THE SEPARATION OF POWER CLAUSE OF ARTICLE TWO, SECTION THREE OF THE CONSTITUTION OF THE STATE OF FLORIDA

Since Section 893.135(3) Florida Statutes provides that the court may consider a sentance other than a mandatory term, if and only if, the state attorney so recommends, the state attorney may cause the mandatory term to be imposed and the court has recourse. Under such circumstances the sentencing function has passed from the judicial branch to the executive branch of government.

The sentencing funtion is vested solely in the court. Rule 3.700 Florida Rules of Criminal Procedure provide as follows:

> (a) The term sentence means the pronouncement by the Court of the penalty imposed upon a defendant for the offense of which he has been adjudged guilty.
>
> (b) Every sentence or other final disposition of the case shall be pronounced in open court. The final disposition of every case shall be entered in the minutes in courts in which minutes are kept, and shall be docketed in courts which do not maintain minutes.
>
> (c) In those cases where it is necessary that sentence be pronounced by a judge other than the judge who presided at tiral, or accepted the plea, the sentencing judge shall not pass sentence until he shall have acquainted himself with what transpired as the trial or the facts, including any plea discussions, converning the plea and the offense.

Of course, the case law affirms the plain meaning of the rule-that only the court has jurisdiction to sentence.

Adams v. State, 347 So.2d 685 (Fla. 4th DCA 1977): *Mary v. State*, 285 So.2d 47 (Fla. 4th DCA 1973): *Green v. State*, 163 So. 712 (Fla. 1935); *Hamilton v. State*, 366 So.2d 8 (Fla. 1978).

Further, Florida Rules of Criminal Procedure 3.171(d) provides that the court may except or reject a plea bargain presented by the state attorney and defense attorney. Obviously it is implicit that sentencing jurisdiction is visted in the court not the state attorney:

> (d) Responsibilities of the Trial Judge. After an agreement on a plea has been reached, the trial judge may have made known to him the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, he shall advise the parties of whether other factors (unknown at the time) may make his concurrence impossible.

Since sentencing jurisdiction is vested in the court not the state attorney, the Florida Statute is unconstitutional for it violates Article Two, Section Three of the Constitution of the State of Florida mandating the separation of powers.

Appellee asserts that the statute does not violate the separation of powers clause citing *People v. Eason*, 386 N.Y.S.2d 673 (1976). Reliance upon *People v. Eason*, is misplaced. Under the New York statute the recommendation of the prosecutor was a condition precedent to the court placing the defendant on probation. Otherwise the full array of sentencing alternatives was open to the trial court. The court held that "as long as the statute does not wrest from the courts the final discretion to impose sentence" it was not a denial of the separation of powers clause. The Florida statute does wrest final discretion from the courts. If the prosecutor does not make recommendation, the sentence is automatically the mandatory term. The court has absolutely no jurisdiction to sentence. The sentence is imposed automatically by lack of recommendation and the statute--that is by the prosecution.

The separation of power clause prohibits a person in one branch of government from performing the functions

of another branch--*Thompson v. State*, 342 So.2d 52 (Fla. 1977); *Nelson v. Lindsey*, 10 S.2d 131 (Fla. 1942); *Florida National Bank of Jacksonville v. Simpson*, 59 So.2d 751 (Fla. 1952).

The statute violates Article Two, Section Three of the Constitution of the State of Florida.

ARGUMENT VII

SECTION 893.135(3) FLORIDA STATUTES IS UNCONSTITUTIONAL FOR IT PROVIDES FOR THE IMPOSITION OF SENTENCE OF IMPRISONMENT BY AN ADMINISTRATIVE AGENCY IN VIOLATION OF ARTICLE ONE, SECTION EIGHTEEN OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Section 893.135(3) Florida Statutes provides that the court may consider a sentence other than a mandatory term, if and only if, the prosecution so recommends. Thus the prosecution has total control over the sentence in that mandatory terms are automatically required unless the prosecution recommends otherwise. Thus the prosecution in every case has complete power to cause mandatory terms to be imposed.

The State attorneys office is an administrative agency within the meaning of Article One, Section Eighteen of the Constitution of the State of Florida.

Blacks Law Dictionary (5th Edition 1979) defines an administrative agency as "a governmental body charged with administering and implimenting particular legislation". The state attorney's office is a governmental body created by Article Five Section Seventeen of the Constitution of the State of Florida. The office is charged with administering and implimenting particular legislation. The constitution mandates that the state attorney perform the duties authorized by general law. the general law embodied in statutes enacted by the legislature establish and limit the authority and responsibilities of the state attorney. Obviously the office is an administrative agency within

the above definition.

The office is a unit of the executive branch of government. Another unit of the executive branch, the police department, has been held to be an administrative agency. *Ex parte Graves*, 128 N.E. 867 (Mass. 1920).

Article One, Section Eighteen of the Constitution of the State of Florida prohibits an administrative agency from sentencing a person to a prison term. If the state attorney's office is construed to be an administrative agency under Section Eighteen, the state attorney is prohibited from sentencing a person to a prison term. Such a construction is consistent with the general doctrine of separation of powers which prohibits a member of the executive branch from performing the functions of a different branch--and thus prohibits the state attorney from sentencing a person to a term. The statute is unconstitutional.

ARGUMENT VIII

SECTION 893.135 FLORIDA STATUTES VIOLATES THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; ARTICLE ONE, SECTIONS SIXTEEN AND TWENTY ONE OF THE CONSTITUTION OF THE STATE OF FLORIDA AND FLORIDA RULES OF CRIMINAL PROCEDURE 3.720 AND 3.180.

The statute provides that where the state attorney has recommended that the court exercise discretion, that the state attorney may present aggravating and mitigating circumstances. The statute does not permit the defendant, not his attorney, nor the public to be present. For good cause the determination can be made in camera.

This process authorized by the Florida statute may be considered to be the sentence hearing controlled by Florida Rule of Criminal Procedure 3.720, or it may be considered to be a unique creation of the statute. In the later event it must, nonetheless, be considered as part of

the sentencing process for evidence is received which will determine if the mandatory term is imposed or not. In either event the process must not violate either the rules of criminal procedure or constitutional protection.

The statute violates Florida Rule of Criminal Procedure 3.720, for the rule provides that the parties may present relevant evidence. Since the sentence is determined during the process, it is an integral part of the trial and sentencing. Therefore, the statute violates the defendant's right to access to the courts (Article One, Section Twenty One of the Constitution of the State of Florida).

The defendant has the right to be present at all critical stages of the criminal prosecution and to have the assistance of counsel. (Sixth Amendment to the Constitution of the United States, or to represent himself (Article One, Section Sixteen of the Constitution of the State of Florida; Florida Rule of Criminal Procedure 3.180, *Williams v. State*, 337 So.2d 846 (Fla. 2d DCA 1979). Sentence is a critical stage and the accused has the right to be present and represented by counsel. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 Led.2d 336 (1967), Florida Rule of Criminal Procedure 3.180). Since sentence is a critical stage the accused is entitled to a public treat (Sixth Amendment to the Constitution of the United States and Article One, Section Sixteen of the Constitution of the State of Florida; the right to confront witness and present evidence (Sixth Amendment to the Constitution of the United States and Article One, Section Sixteen of the Constitution of the State of Florida, Florida Rule Criminal Procedure 3.720). The Florida statute violates the above.

Where a defendant is convicted of a capital crime, pursuant to Section 921.141, Florida Statutes, the jury hears aggravating and mitigating circumstances and makes recommendation to the court. It is totally unthinkable that the defendant and his attorney could not appear before the jury to submit evidence. It is totally unthinkable that after the jury recommendation the court would hear a presentation of aggravating and

mitigating circumstances by the state attorney in the absence of the defendant and his attorney. The Florida statute allows an analogous procedure.

The fact that formal sentencing is to follow does not detract from the above argument. The defendant and his attorney would not be aware of the evidence presented by the state attorney in private session and thus are embarrassed in the preparation of argument. Further, under this curcumstances his counsel may afford effective representation.

It is apparent that the statute violates Criminal Procedure Rule 3.720 or Criminal Procedure Rule 3.180.

Further the statute violations of the right to an attorney, the right to effective attorney, the right to confront witnesses, and present evidence, the right to a public trial, and the right of access to the courts.

ARGUMENT IX

SECTION 893.135(3) FLORIDA IS NOT SEVERABLE.

The enactment of the savings clause does not control this Honorable Court's determination of the issue of severability, *Small v. Sun Oil* 222 So.2d 196 (Fla. 1969), *State v. Lee*, 356 So.2d 276 (Fla. 1978). This Honorable Court in *State v. Lee*, amplied the point:

> 3. It has been suggested that severability clauses have become so commonplace that their significance should be considered minimal. See Kapaun v. Federal Land Bank of Omaha, 64 S.D. 635, 269 N.W. 564 (1936). While not "routine" in Florida, the use of such clauses has been fairly regular. In the 1975 regular session, the Legislature put a severability clause in 26 of its statutes. In 1976 a like clause was contained in 20 statutes, and in 1977 a like clause was contained in 30 statutes.
> [Footnote 3 p. 284]

The following excerpts from the legislature history indicate that the intent of the legislature was to afford the prosecution a means of obtaining information from lower echelon defendants to be used in the prosecution of higher echelon offenders.

The test of whether subsection (3) is severable is the intent of the legislature. *State v. Lee, supra,* suggested the following concepts be used as guidelines:

1. Whether the statute would have been enacted without the invalid provision.

It cannot be seriously argued that the legislature would have enacted the statute without subsection (3) in order to prohibit drug trafficking for other sections of Chapter 893 Florida statute had already done so.

It can be seriously argued that the legislature would have enacted the statute without subsection (3) in order to impose mandatory terms. The purpose of the statute was not to impose mandatory terms but to use the threat of mandatory terms to coerce lower echelon persons to afford assistance in prosecuting higher echelon persons. Had the legislature intended to impose mandatory terms they would have done so.

HOUSE OF REPRESENTATIVES COMMITTEE ON CRIMINAL JUSTICE

REPRESENTATIVE HABEN: --So, I think because there is a way out, it is not a pure mandatory minimum on one hand and number two, because it involves a crime that of necessity must be a conspiracy, I both heartily endorse and support the concept.

2. Whether the unaffected portions of the statute would produce a result never contemplated by the legislature.

The result contemplated by the legislature was that the lower echelon would provide substantial assistance in the prosecution of the higher. If the portion of the statute providing for substantial assistance in return for avoidance of a mandatory term is severed, the result contemplated by the legislature will be defeated.

Further if subsection (3) is severed, all persons

convicted will receive mandatory terms. This would result in an increased demand upon prison facilities and increased costs and taxes. The legislature did not give substantial attention to the fiscal consequences of the statute as written. (See appendix). To the writer's knowledge the legislature gave no consideration to the increase costs which would result from severance of subsection (3).

Of course, as stated by Senator Spicola the whole object of the statute is to force substantial assistance from lower echelon to prosecute higher. Subsection (3) is the only part of the statute which implements this purpose.

3. Whether the invalid provision was an inducement to the enactment of the other provisions. The subsection is not severable.

Since Section 893.135(3) is unconstitutional, and not severable, Section 893.135 is unconstitutional in accordance with the principles and authorities analyzed herein.

CONCLUSION

Based upon the cases, authorities and policies cited herein, MR. DANIEL COWGILL, urges this Honorable Court to hold that Section 893.135 is unconstitutional, and in violation of the Florida Rules of Criminal procedure cited herein.

LAW OFFICES OF PHILIP CARLTON, JR.
Attorney for Defendant, COWGILL
19 West Flagler, Suite 220
Miami, Florida 33130
PH: (305) 377-1471

BY: /S/ Philip Carlton, Jr.

DATE: May 29, 1979 (updated)

SENATE STAFF ANALYSIS AND
ECONOMIC IMPACT STATEMENT

ANALYST	STAFF DIRECTOR
/. J. Smith	Dunn
2.	
3.	

REFERENCE	ACTION
/. J.Crim.	Fav.
2.	
3.	

SUBJECT: Providing minimum mandatory sentences for trafficking in large quantities of certain controlled substances

BILL NO. AND SPONSOR:
SB 83 by Senator Don Childers

[Staff analysis follows]

I. SUMMARY:

A. Present Situation:

To sell, manufacture, or deliver, or possess with the intent to sell, manufacture, or deliver a controlled substance:

DRUG	AMOUNT	PENALTY	PUNISHMENT
Cannabis	not more than 5 grams (first offense)	Misdemeanor of 1st degree	1 yr/$ 1,000
Cannabis	less than 100 lbs.	3rd degree felony	5 yrs/$ 5,000
Cannabis	in excess of 100 lbs.	2nd degree felony	15 yrs/$10,000
Heroin	10 grams or less	2nd degree felony	15 yrs/$10,000
Opium	any amount	2nd degree felony	15 yrs/$10,000
Morphine	any amount	2nd degree felony	15 yrs/$10,000
Cocaine	any amount	2nd degree felony	15 yrs/$10,000

To sell, deliver or possess in excess of 10 grams:

Heroin		1st degree felony	30 yrs/$10,000

Any person over age of 18 years to sell to any person under 18 years of age:

Cannabis	any amount	2nd degree felony	15 yrs/$10,000
Heroin	any amount	1st degree felony	30 yrs/$10,000
Opium	any amount	1st degree felony	30 yrs/$10,000
Morphine	any amount	1st degree felony	30 yrs/$10,000
Cocaine	any amount	1st degree felony	30 yrs/$10,000

IMPOSITION OF SENTENCE SHALL NOT BE SUSPENDED OR DEFERRED, NOR SHALL PERSON BE PLACED ON PROBATION.

Bring a controlled substance into this state:

Cannabis	any amount	3rd degree felony	5yrs/$ 5,000
Heroin	any amount	2nd degree felony	15 yrs/$10,000
Opium	any amount	2nd degree felony	15 yrs/$10,000
Morphine	any amount	2nd degree felony	15 yrs/$10,000
Cocaine	any amount	2nd degree felony	15 yrs/$10,000

It is unlawful to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner...violation of this provision constitutes a felony of the 3rd degree.

B. Effect of Proposed Changes:

SB 83 creates the crimes of trafficking in marijuana, trafficking in cocaine and trafficking in illegal drugs. The Committee Substitute provides mandatory minimum penalties and additional fines for each of the crimes created. Provisions are also made for reduction or suspension of sentence upon appropriate motion by the state attorney where the defendant has been convicted under the new section and has given substantial assistance in the identification, arrest, or conviction of any of his accomplices, co-conspirators, accessories or principals. The arresting agency shall be given the opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard *in camera*.

Section 893.13, Florida Statutes, paragraphs (a) and (b) of subsection (1) are amended to prevent conflict between those provisions and the provisions of the new section.

II ECONOMIC IMPACT AND FISCAL NOTE:

A. Public: Indeterminate.

B. Government: Determination of the fiscal impact of this bill is difficult to ascertain. The Florida Department of Law Enforcement has a breakdown by arrests only; but statistics are not available on the number of convictions obtained from the drug arrests. It should also be noted that the type of drugs and the quantity in possession of a defendant is also not present in available records.

Further, we are not able to determine how much

prison time a defendant serves under the present statute when compared to the minimums in the proposed legislation.

Finally, the number of defendants who will plead for a lesser charge or probation in lieu of the mandatory sentences (after giving substantial information to the prosecution) is not possible to project. The impact for the next two years would appear to be minimal especially in light of the substantial sums of money occuring under the system of fines imposed in this legislation.

If, however, the sentences are imposed the minimum costs per inmate per minimum sentence is as follows:

3 yrs -	$16,425
5 yrs -	27,375
10 yrs -	54,750
15 yrs -	82,125
25 yrs -	136,875

III COMMENTS:

COMPARISON OF PENALTIES
IN
PRESENT LAW AND CS FOR SB 620
FOR POSSESSION, MANUFACTURE,
DELIVERY, ETC. OF CERTAIN AMOUNTS OF
CONTROLLED SUBSTANCES.

Cannabis	*Present law*	*Committe Substitute*
100 lbs.	15 yrs. and/or $10,000	30 yrs (3 yr minimum) and $ 25,000
2,000 lbs.	" "	30 yrs (5 yr minimum) and $ 50,000
10,000 lbs.	" "	30 yrs (15 yr minimum) and $200,00
**Cocaine*		
28 grams	15 yrs. and/or $10,000	30 yrs (3 yr minimum) and $ 50,000
200 grams	" "	30 yrs (5 yr minimum) and $100,000
400 grams	" "	30 yrs (15 yr minimum) and $250,000

Heroin (also morphine, opium, salt, isomer, etc.)

4 grams	15 yrs. and/or $10,000	30 yrs (3 yr minimum) and $ 50,000
14 grams	" "	30 yrs (10 yr minimum) and $100,000
28 grams	30 yrs. and/or $10,000	30 yrs (25 yr minimum) and $500,000

a-232

*to be read: X grams of any mixture containing (cocaine/heroin)

CS/SB 620 by Senator Spicola was substituted for SB 83. SB 83 passed the Senate April 5, 1979, by a vote for 38 yeas - 2 nays, and was signed by the Governor April 6, 1979. chapter 79-1)

IV. AMENDMENTS:

None

Proposed Committee Bill #16

March 30, 1979

SB 83
HB 1506 by the Committee on Criminal Justice

Provides for minimum mandatory penalties for drug trafficking.

Other Committees of Reference
None

I. *Statement of the Problem*
Drug trafficking has become a major problem for law enforcement in the State of Florida. The *profits* are extremely *high* and the *risks* are relatively *low*.

II. *Fiscal Impact*
See attached fiscal note.

III. *Comments*

A. Discussion
The bill provides for a class of drug offenses designated as "trafficking." The bill provides for a graduated scale of minimum mandatory term of imprisonment and fine on persons convicted of trafficking in cannabis, cocaine or heroin. The bill contains a provision which allows the offender to "hold the key to the jail", by providing that the sentence can be *reduced or suspended if the offender cooperates* with law enforcement. The bill would place the penalties on the suppliers.

B. *Constitutionality*
The bill appears to be constitutional.

C. *Legislative Intent*
Adequately expressed.

IV. *Amendments*

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Exhibit A

BILL SUMMARY - PCB #16

Amounts	*Present* Penalty	*Proposed* Penalty	
Cannabis			
100 lbs.	Poss/Sale - 15 yrs/$10,000	15 yrs (*3 yr min*)	*$ 25,000*
2,000 lbs.	" " "	15 yrs (*5 yr min*)	*$ 50,000*
10,000 lbs.	" " "	15 yr *minimum*	*$200,000*
Cocaine			
1 oz. (28 gr)	Poss/Sale - 30 yrs/$10,000	30 yrs (*3 yr min*)	*$ 50,000*
½ lb.	" " "	30 yrs (*5 yr min*)	*$100,000*
1 lb.	" " "	30 yrs(*15 yr min*)	*$250,000*
Heroin			
0.15 oz. (4gr)	Poss Sale - 15 yrs/$10,000	15 yrs (*3 yr min*)	*$ 50,000*
0.5 oz. (14 gr)	" 30 yrs/$10,000	30 yrs(*10 yr min*)	*$100,000*
1 oz. (28 gr)	" 30 yrs/$10,000	30 yrs(*25 yr min*)	*$500,000*

BEFORE THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
AT
THE CAPITOL
TALLAHASSEE, FLORIDA
APRIL 3, 1979

IN RE
PROPOSED COMMITTEE BILL 16

PROCEEDINGS

[2]

MR. CHAIRMAN: All right, a quorum being present, let's take up the proposed committee bill on drug smuggling which is entitled, what? Number 16. Question.

VOICE: Mr. Chairman, do we plan to vote this either up or down?

MR. CHAIRMAN: Yes, we do. Al right, let me just for the sake of relieving some confusion, make sure that you have in your hands Proposed Committee Bill Number 16. We have some others around that are different drafts-we have a Senate draft around and we are going to try to go with a House bill, Proposed Committee Bill Number 16. Let me just briefly explain what we're talking about here. We're approaching the drug smuggling problem from two standpoints: number one, we are going to apply a minimum mandatory sentence on people caught in the activity of trafficking in drugs; number two, we're also going to try to give law enforcement and prosecution the leverage to get at higher echelon financiers of these operations by giving them the tool of offering reduced sentences of those people after convictions, if they will cooperate and help convict people who are their accessories. Now, that is a two-pronged approach. At this point, I think we have a couple of people who would like to speak on behalf of the bill. First, let me call Representative Ralph Haben

before the Committee, who is our illustrious Rules chairman, former chairman of this committee. I think he might like to make a couple of comments.

REPRESENTATIVE HABEN: Mr. Chairman, I appreciate it. Ordinarily, I would not come down, but the reason I've done so is that I think I need to explain to the Committee something.

I am still opposed to mandatory minimum sentencing. Now, I won't go into all the reasons why I am, and so therefore I felt obligated to come down and explain to you why I'm supporting this particular measure.

Mainly, I'm supporting it because General Counsel for the Governor and the Director of the Department of Criminal Law Enforcement closed the door on the Governor's jet, and said if I didn't support it they wouldn't let on.

Seriously, though, I see, I think, a distinction between this concept and mandatory minimums across the board. The reason I'm opposed to starting with mandatory minimums, if you say mandatory minimum for robbery, what then do you say to the person who's committed murder, and then how do you say we can't have mandatory minimum for assault on an old person? In other words, if you are going to do it, you have to go across the board. Therefore, let me distinguish this, I think, example: drug smuggling, and what the Governor is trying to get at involves, obviously, a conspiracy. If you have a conspiracy, that is the most difficult of crimes to prove, I think; as Assistance State Attorney, I can tell you, it is tough to prove. I've defended conspiracy cases, and every one of those defendants, the jury was back in five minutes, turning them loose. Conspiracy is hard to prove.

So therefore, I think the Governor has come up with an (inaudible) that I can support. Two reasons: number one, you're dealing with a crime that involves a conspiracy and it is necessary to have testimony where one party to the conspiracy turns state's evidence, so

that you can ultimately convict the person that financed the operation. In addition to that, I think this is not a pure mandatory minimum. It is a mandatory minimum if you are caught and convicted or enter a plea and choose not to aid and addist law enforcement. And I think it's going to work because right now, if a pilot or a courier is arrested, what he'll do, he'll spend two to three years in Raiford, at tow or three hundred thousand dollars a year, because it's profitable for him to stay in jail. If you told him it's going to be fifteen years in Raiford without gain time, without a possibility of parole or probation, he's not going to spend fifteen years in Raiford, he's going to turn state's evidence. So, I think because of the fact that there is a way out, it is not a pure mandatory minimum on one hand and number two, because it involves a crime that of necessity must be a conspiracy, I both heartily endorse and support the concept.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Thank you, Mr. Chairman.

REPRESENTATIVE MARTINEZ: Mr. Chairman.

MR. CHAIRMAN: Representative Martinez.

VOICE: Ralph, I have one question. Would the gentleman yield?

REPRESENTATIVE MARTINEZ: Sure.

VOICE: Is this built-in statutory plea-bargaining?

REPRESENTATIVE HABEN: We hope so. We hope so, because that's really what we're talking about. I think you've got to also dovetail this concept with the fact-the one thing I liked the most about the Governor's address this morning, he's willing to put his money where his mouth is. For six years I've been a voice in the wilderness, saying we've got to put more funds into the law enforcement program, and he has said all right, that's precisely what we're going to do. And I think you're going to get plea-bargaining, I hope you do, because if you get that, you'll get the testimony against somebody who finances the operation.

MR. CHAIRMAN: Further questions?

REPRESENTATIVE EASLEY: Mr. Chairman?

MR. CHAIRMAN: Mrs. Easley.

REPRESENTATIVE EASLEY: I just have one, on the section which does permit a judge to --

VOICE: Reduce or suspend it.

REPRESENTATIVE EASLEY: Yes, but it must be filed -- I can't tell, it says whenever a person is convicted or imprisoned for violation, does that go all the way through and he has to have received a sentence, or is this prior to sentencing, or both?

VOICE: That is, as I understand it, it would be after the conviction. Prior to sentencing or after sentencing.

REPRESENTATIVE EASLEY: Or after sentencing?

VOICE: Right.

REPRESENTATIVE EASLEY: If it's prior to, have we only changed the jail time -- what I'm getting at, is the guy going to have to pay that fine regardless? 'i'd kind of like to make it also not profitable. If he's in prison, I assume he's not going to have his fine returned.

VOICE: Well, the way it is there, it gives the judge the opportunity to do both. He can suspend the jail time, or suspend the fine, or suspend a portion of the fine, or a portion of the jail time. If he's in prison --

REPRESENTATIVE EASLEY: So it's up to the judge?

VOICE: It would be up to the judge and --

REPRESENTATIVE EASLEY: Now, if he's already imprisoned, could the judge also order a partial or total return of the fine?

VOICE: Yes. Yes, because that's what the bill entails, because the judge is going to suspend part of that jail time.

REPRESENTATIVE EASLEY: Would somebody tell me -- I don't have any other reaction than just, I don't know whether we want to do that or not.

MR. CHAIRMAN: Well, I think, first of all, the State Attorney has to ask for it, and the judge has to approve it, and law enforcement is going to be involved with it, too, so I think if it's done, it's going to be appropriate.

REPRESENTATIVE EASLEY: Okay.

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: Did I have a question

on my face? I'm kind of concerned about why we call this mandatory. It looks like everything but.

MR. CHAIRMAN: Well, I think that it's mandatory, and it's minimum -- the concepts have different meanings in this bill. It is mandatory if they fall into this category to get it. If they do not cooperate, if the State Attorney does not petition, it is mandatory that the court impose that, so it is mandatory on the judge. He can only be relieved by petition from the State Attorney.

REPRESENTATIVE SAMPLE: All right, is this mandatory if they don't cooperate? Are we going to have to add some more specificity to what is cooperation, or are we just going to spell it out and say if you don't squeal?

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: Well, I have only one question to ask staff concerning -- in discussing this with Mr. Haben. where in the statute do they define the word "substantial"?

VOICE: We can define it if you want. You can define -- you know, but it is going to be questionable --

REPRESENTATIVE HABEN: Mr. Chairman, can I respond to that?

MR. CHAIRMAN: Representative Haben.

REPRESENTATIVE HABEN: Representative Fontana, I raised that, because I started reading it first of all as a defense lawyer, and what could I do, you know, to get around that, but I'm afraid if you try to define what substantial is, you're going to open the box of information leading to a conviction, which is going to give you a problem, because what if the guy really does what he is supposed to do and turns state's evidence and, for one reason or another, you end up with a hung jury, or you lose a witness during the trial, and you end up with a mistrial or the State Attorney feels that he can't press on, and the conviction doesn't occur, than you haven't satisfied the statute. So it seems to me that, even though it would be desirable to give some degree of specificity, I think if you try to do it, I think you get into a

box you can't get back out of. It would be nice to do it. but if we do it, I think we're going to probably overload it.

MR. CHAIRMAN: Very well. Representative Smith.

REPRESENTATIVE SMITH: I'm kind of concerned about this thing, too, in that, as I understand, the money people are pretty well insulated. And the fellow we're going to catch, how much do you think he can possibly give, and -- plea-bargaining is one thing, but I just don't -- I tend to think that maybe this is more of a deterrent-type thing, personally, than it will be for anything that we can glean from this guy in terms of getting the money people.

MR. CHAIRMAN: I agree. I think it has a two-pronged effect. If you can't get it from one standpoint, it has a deterrent effect from the other standpoint. Representative Martinez.

REPRESENTATIVE MARTINEZ: Mr. Chairman, if I may, I like the concept, and I am trying to be constructive about it but you already have a tool, and that's immunity. The State Attorney can give immunity to anyone, and I think the substantial aspect of this thing is a key that might work against us. I've defended too many of these cases, and it's usually the mule, the guy that's unloading the ship, or the guy who happens to be driving the truck. The financier is the one we're trying to get. If a guy is driving a truck for someone who he doesn't know, and he's getting paid by someone else, that's as far as he can go. I think that the word ''substantial'' here, the way it is written, it's not a judicial question, because first of all, the State Attorney has to be convinced that it's substantial and the State Attorney has to file the petition, and the defendant doesn't have anything. He's making a deal and buying a pig in a poke, at this point. And I think if we're going to have a mechanism to determine whether the guy really helped or not, that that point there should be an adversary proceeding rather than leave it up to the State Attorney. If the State Attorney doesn't file it before this

comes into play, these are the problems I see with it. The man has to already have been convicted. That means the judge has to have him before him and say, I hereby find you guilty of this offense. He's through with the judicial process at that point. The only thing the judge can do is set sentencing further on, but he's got to find him guilty. You've already made him a felon, which is all right with me, if the guy wants to do it, but at that point, he's completely out of the picture. His attorney can't come up and say, hey, Court, now look, that's all the man knows. He's out of the picture. It's just the State Attorney and the law enforcement, and if the Law enforcement, if a detective has a particular gripe against this guy, or the guy made a fool of him before, and didn't catch him, and the policeman wants this guy to go away for fifteen years, it doesn't matter what the State Attorney is going to say, that policeman can come in and tell them, this guy shouldn't go anywhere. He should go to jail for fifteen years, and he knows who the top man is, but the defendant is there, really - there is really no inducement for him to do anything because he's not guaranteed anything. The State Attorney can give him immunity and then he's free from everything. The intent of this bill is not going to make him free of anything. Let's say he talks. If I'm a defendant, I'm representing him, and I say, look, they've given me this deal and if I talk, after I get convicted, I can get out of the fifteen years. Well, what if they're not satisfied? You've lost me at that point. Now if I get convicted, I can't go in and I can't initiate a condition, and if the judge doesn't buy it, and if the officer doesn't like you, you're going to jail with the same guys you helped convict. So I'd think about it twice. I think, really, the word "substantial", it's not even clear. The judge may have some hangups as to how far it should go. The concept is great, but unless you give that defendant something to go on so that he can at least show the court, look, all I did was drive the truck and John Brown was the one that was supposed to pay me, and John Brown

told me that his boss was going to have to bring him the money first. So who's his boss? I don't know. Oh, yes, you know, you just don't want to tell us, you haven't given us any help.

I bet that the intent might have been, and I think this might help the bill, and I throw it out just to think about - if, when we're talking on the last page, page 4, whenever a person is convicted or imprisoned, that refers to the guy doing the talking. He's got to be convicted or imprisoned. I think, really, if you want to get at the high level, then let that conviction be of the one he ratted on. If his testimony is good enough to convict him, the guy over him, then he's entitled to this, you see what I mean?

MR. CHAIRMAN: Let me see this right quick-like. We have some representatives of the Governor's office here, and I think we have Ed Blackburn, Robin Gibson and Jim White, and so, in any order that you'd like to speak, I think we ought to give all of them a chance.

MR. BLACKBURN: Well, Mr. Chairman, if I might, I'd like to respond to what Mr. Martinez had to say. Incidentally, I don't know the ground rules, Mr. Chairman. This is the first time I've ever appeared as an adversary to Mr. Martinez when he was a voting member and I wasn't. This does put me at somewhat of a handicap. We used to have some delightful - on the floor - and incidentally, he was a client of mine in the life insurance business, in which he paid his premium every month, that was drafted out of his bank account. We had some serious controversy one day on a bill and he sat right behind me; he tapped me on the shoulder and said, "If you don't stop that position, I'm going to cancel that contract. It'll cost you $3.40 a month."

REPRESENTATIVE MARTINEZ: Point of personal privilege. You know, Ed's response was, "If I weren't getting that $3.40 from you every month, I'd kill you."

MR. BLACKBURN: But, with just this little bit of overview, the Federal Drug Administration says that the narcotics business in Florida brings in some $10,000,000

a day, approaching $4 billion a year, and that we don't catch, all the agencies combined, we don't catch over 10 percent of it.

Without going into what this does to, these monies do to buy into, what this does for organized crime to increase their strength, and to buy into businesses all over the state - if I told you some of the businesses, which I can't that I know about that they have bought into, believe me, it would be frightening. They have bought into banks - I know of five banks that they own and control in Florida - they are in the real estate business, they've bought controlling in companies over the counter. Shopping centers, they're strong in, and their land acquisitions are spread from the Panhandle on down to central Florida.

So that's just a brief overview of that, but the points Mr. Martinez made about the defendants, you know, he'd lose this right, but, really, I'm not near as concerned about the defendant as I might ought to be when we see what they're doing to this state. What we're really trying to do is to get the man at the top, but if we miss one or two along the way - let me give you this example.

Just like four weeks ago, I believe it was, today, down at Newport, and it happened that I went down there one night, and the sheriffs of the three surrounding counties here, the sheriff from Gadsden, the sheriff from Wakulla, and the sheriff from Jefferson, were down there with the Department of Natural Resources, Customs, United States Coast Guard, and with the DEA. They had impounded a 65-foot shrimp boat. They thought when they first went in it had thirty tons on it; it only had twenty-four, actually. They had three trucks, two of them worth better than $50 thousand apiece, and they had, I don't know, quite a few under arrest. We later learned that this had been brought in here from Marathon. The twenty-four tons, according to the people who figure the price of this stuff over at our agency, which is something I know nothing about, said

that a minimum, when this was purchased in Colombia, this was the real good grade Colombian marijuana, said it was worth $5 million; said delivered to Marathon, it was worth ten. Whoever bought it in Marathon paid another five. But, to the point, the man who ran - and Mr. Martinez, this is the thing that was really interesting to me - the man, the captain of the boat readily admitted that his new contract was $50 thousand to deliver it from Marathon to Newport, just to deliver it here.

Well, with this bill law, in which he being required to serve fifteen years, and I believe the fine here is a quarter of million dollars, the first question that comes to mind, would he have taken this contract? I'm not worried about how he's going to get out later, you know, if so and so happens but would he have taken this contract had he known that Florida had a law that states, you're going to get fifteen years and you'll have to pay a quarter of a million dollars to get out?

More interesting than that, would the man that, (inaudible) in Marathon, who had made the deal with him, would he have hired this fellow to deliver it here had he known that if that fellow delivered it there, if he squeals on me, he can get out of it?

What we're all interested in, and I know that you folks are, is getting the people at the top of this ladder. For whatever my beliefs are worth, I think you've got to make it just as tough as you can on that man at the bottom to get the man at the top. I believe this: I believe that this Legislature will pass this bill. It'll advertise to the world that Florida ain't the place to come. And I think you'll reduce the proportion of this stuff coming in here overnight.

That winds me up.

MR. CHAIRMAN: Tony.

REPRESENTATIVE FONTANA: Let me ask you a question Sheriff. You know, I'm for the bill, but let's put it in another - let's reverse it all a little bit. Let's say that you, Sheriff Blackburn, is the person with the money. Now, Haben has a license that, he flies, so it so happens

that Mr. Haben feels one time that he needs some cash. So he's going to take that one shot, and he's going to fly that carg somewhere, okay? Wasn't sure he's going to get his money, he didn't get caught. The other fellow with the money, what about later on when you get picked up, and you say, well, okay, now, I'm going to come under this statute because I'm going to tell you who flew so many tons of marijuana, whatever, into this airport or whatever. You have the same right, then, to go to the State's Attorney and start saying, well, now look, I know that Ralph Haben flies, I know that, and I can prove to you that on December 2nd he flew ten tons of marijuana to anywhere. That gives you the same right - you're the fellow that's putting up the money, now - to go ahead and rat out on Mr. Haben and send him away.

MR. BLACKBURN: When he wasn't a part of the same deal, is that your point?

REPRESENTATIVE FONTANA: Right. He's moving marijuana, he moved it once, that's all.

MR. BLACKBURN: Well, I think the State's Attorney, under present law, has the authority to do that, without this statute. I believe that he has. I believe that the State's Attorney, right now - let's say, let's forget this bill. That anybody that's charged with a crime, if you were to go to the State's Attorney today and say, you know, if you'll go easy on me on this one - you've done it, you've done it, too, in - Sheriff (inaudible), you've done it in burglary cases. If they'll give you evidence on somebody else, on a bigger one, I bet you that you'd stop back and think - we've all done it in law enforcement.

REPRESENTATIVE FONTANA: But you haven't answered the question. How do you get the man with the money if he goes up and he tells them, tells the State's Attorney about how it's being transported and who's involved? Do you understand what I'm saying?

MR. BLACKBURN: Maybe all you catch is the man at the bottom. Maybe all you catch is the man - I'm not concerned with the defendant that will bring these drugs

in here. This bill doesn't only talk about marijuana. It talks about heroin, cocaine, morphine, the rest of them. I'm really not as concerned about their rights as perhaps I should be. I'm thinking about what they're doing to this state. Last year - what they're doing to our children. Last year in Florida along, under the age of twenty-five, over twenty-five thousand young people were charged with narcotics violations. I want to stop these people that are bringing in here, stuff. And if some of them lose, are imprisoned along the way, that's just too bad.

MR. CHAIRMAN: Let me, before we have any further questions, let me ask Robin Gibson, if he would, to make a few remarks, and then, at that point, we'll ask some more questions and discuss it. Robin Gibson is with the Governor's office.

MR. GIBSON?: I want to make a couple of remarks. I also want to make an introduction of Jim White.

First off, the bill is designed not to get the mule, but to get the thoroughbred. It can be interpreted to where you can go up or down the ladder, but the information has to be substantial enought to warrant the State Attorney's filing his petition, and thereafter, consideration by the judge.

I'd recommend that the language of the statute stay as it is. If we had a particular case before us, if we knew what the facts in that case were, we could collectively decide what the best thing to do was. But we don't have the facts of a particular case before us. We have to give the authority to the State Attorney, who has the facts of that particular case before him, and trust in the good judgment of the judge who has the facts of that case before him. We would be doing ourselves a disservice, I think, if we gave our Law enforcement people the tools, and then by adding restrictions or making requirements on how these tools would be used, we'd, in effect, be tying one hand behind their backs, and the tools would be laying out in front of them.

We should give them the maximum discretion to determine what substantial assistance is. Like Sheriff

Blackburn says, if they determine that that piece of information is not adequate, I'm not sorry for them, either. It's just not substantial enough to warrant getting out of a prison sentence of this kind for an offense of this kind.

But unless we knew what the particular facts of the case were, we'd better leave that up to the decision of the people who have the facts of that case in front of them.

The unique quality of the crime with which we are faced is that number one, it's an economic crime, and number tow, it involves a network. This statute is aimed at economic aspects of that crime, by, one, imposing stiff fines, and by, two, going after the people who have the money, and that are at the top of the structure. And since it is a kind of a network, it requires, as Mr. Haben is talking about, it requires a method by which you can go step by step up the ladder of this conspiracy. Like Sheriff Blackburn says, it has two effects. We're just here talking about the practical effects, now, a real case. But, as the Sheriff talks about the symbolic effects we need the statute in its present form so that it will have both the practical strenght and the symbolic strength that the statute has to offer.

Jim White is the Assistant General Counsel in our office, who is in charge of law enforcement matters. Jim has tried a number of these cases himself. He and Sonny Palomino have worked together on the drafting of this statute, and I'd like to introduce him for his comments. He can explain the provisions of the statute, and field some questions on it. I, in closing, I would just simply say that, on behalf of the Governor, that he has recognized what we all know: that is, that this is a unique problem that is at our doorstep.

We have a national problem on our hands. We just happen to be the gateway for it, and a unique problem requires a unique solution. This statute is a unique statute, and it is something that would be new and different and of material assistance to law enforcement

agencies in our state, and we need it. Jim.

MR. CHAIRMAN: Before we hear, any questions about this? Representative Lehman.

REPRESENTATIVE LEHMAN: I wanted to ask one question. Can anybody give me any indication on how much violence has been involved in these large hauls of drugs?

MR. WHITE: Mr. Chairman, members of the Committee, I appreciate the comments. We worked with regard to building this bill around the format that Mr. Gibson and Representative Haben and our executive director, Sheriff Blackburn, have indicated.

The problem is, however, in dealing with these people, that they have us covered (inaudible). Having handled cases like this, you're exactly right; the people that you catch at the dock, the people that you catch at the airport, the landing facility, are all mules. They're people that are working for somebody else. Most of the time, they know who they're working for, because people don't put $5 million worth of drugs in their hands, and not have some tie to them and know where they're going and know who they are.

They will represent to you many times that they don't know who they are working for. But I think logic will explain that they have got to have some contact between them and the man with the money, the man that's controlling the operation. These people are the beginning point.

At the stage of the proceedings we have now, with plea-barbaining in - with the tools that we have for plea-bargaining right now, most of these people are assured that if they max out, if they get five years in the state penitentiary, they will do 18 months, if they do it under good time. If they do 18 months, the people in charge explain to them that you will be paid a minimum of $50 thousand dollars a year, your family will be taken care of, and when you get back out, you will have a job. All you have to do is keep you mouth shut.

On the other hand, if you talk, you'll be visited by

sounds in the night. And, consequently, we get no cooperation. I've have off-loaders tell me, I'd like to help, but I need the rest. I'm going to take the 18 months and the $100 thousand dollars, and I'm not going to help you.

On some occasions, when we've been able to keep plea-bargaining to a minimum, in a good solid, cold case, some of these people have offered some assistance to us. The experience in this assistance has been that they feel like they will tell you just enough to get out from under the heat. They don't want to tell you everything, so they'll give you just enough. The position that we have taken, and the way that we try to make whatever assurances we can, is we have their defense attorney come to us. And their defense attorney can tell you a, b, c, d, and e; we can tell you where from, we can tell you who paid us, we can tell you all these sorts of things, and we will be prepared to testify to that. If we were able to do that, and if we were able to come across, and if we were able to assist you in that fashion, could you consider that substantial assistance?

At that stage of the proceedings, we could say yes or no. Now, sometimes, substantial assistance could be a conviction. But sometimes, it may be worthwhile to the State Attorney and to the investigating agency just to have the intelligence. They may not be able to see a conviction right away. They may not even be able to use this man on the stand, because of his past criminal history. But maybe he can provide them enough probable cuase for a search warrant, or enough probable cause for a wire intercept, or something of that nature. So, when Robin Gibson tells you that if we begin to tie down this thing and say, well, you have got to have a conviction, maybe the law enforcement officers at this stage of the proceedings wouldn't want to use this man for a conviction. Maybe they'd want to use him as a confidential source. Maybe they'd want to use him to be present at the next time one of these smuggling operations was planned.

So, I think the other matter that I wanted to discuss briefly is, I would hesitate in turning this substantial assistance into an adversary proceeding. I would hate to be a State Attorney who, I'm planning using this particular individual to assist me, but at the same time, I know, down the road, he and I are going to be arguing, involved in an adversary proceeding as to how much his assistance was. That makes him want to pull back just a little bit.

Maybe my defense attorney can argue that if I just tell them the names, that would be sufficient. Maybe the State Attorney wants me to tell them the names, the dates, and the suppliers. Well, I'll just tell them the names, and we'll get my attorney at argue before the court that that was substantial assistance.

So we would raise, simply, as I would see it, we would raise a real controversy, that the whole time you're trying to get this person to assist you.

VOICE: Another trial.

MR. WHITE: Yes, really, you'd have a mini-trial. You'd have another trial to try whether or not that was substantial.

If that State Attorney, along with the investigating or arresting agency, can commit to you and tell you, sure, if you tell me a, b, c, d and e, or if you can do this or that, in light of the information we already have, that will be substantial. That's the way it's handled now, with immunity.

But, you see, with immunity, you have to give them all one shot or not. There's no middle of the road. This provides the State Attorney and arresting agency with a middle ground or middle of the road approach they can take.

We hope that we will - I know Representative Haben is a pilot, so - but I want to use him one more time, he was already used previously. But, we want to keep the one-time pilots out of the business, too. They're breaking our backs with what they're bringing in. We want to serve as a deterrent all the way to the bottom,

from the bottom all the way to the top. If this bill goes at the people who are involved in trafficking, we're not talking about people who are involved in first-time use, or the people who are involved in possessing a little bit for their own use and their friends. The values compiled here were compiled with the consultation of Law enforcement agencies, State Attorneys, and other knowledgeable people, informants, for that matter, and they tell us that these amounts are the amounts of heavy traffickers.

Somebody caught with this should be - have to pay the piper, or at least have to give substantial assistance.

MR. CHAIRMAN: Any questions of Mr. White?

REPRESENTATIVE MARTINEZ: I have a question.

MR. CHAIRMAN: Representative Martinez.

REPRESENTATIVE MARTINEZ: I think perhaps my remarks were misunderstood. Are you telling us that the informant will cooperate simply on a promise, you tell us everything we want to know, and then we'll see about getting you under this program? That's what the bill says now. We will decide, we will decide after you tell us everything you want - we want to know, we will decide then whether you come under this program or not.

What I'm trying to say is, I have no argument with that. But what inducement would it be to him, to this man, if he had no assurances whatsoever that he could strike a bargain prior to his being convicted? If he doesn't strike a bargain before he's convicted, he's going to be dead. And we all know that.

MR. WHITE: If I may respond, sir, I think it meets the same rationale as we do with immunity. It only gives us a middle ground.

In the cases that I've been involved in that have dealt with granting immunity, I never grant immunity before I know the nature, not the individual facts, but the nature of the information the defendant seeks to give me. And I think you can get this if you represented a client who could give us the names, addresses, dates, telephone numbers, and places of meeting before you

told me those specifics, the representative, the defense attorney would come to me and say, listen, I can tell you the date, the time, the names of the people, where they're going to deliver and what time. Would you consider that, if I come through on those things, would you consider that substantial assistance? The State attorney will then inform you at that stage of the proceedings yes or no. You don't have to put your pig in a poke. Just like in immunity, you know, the State Attorney doesn't put his pig in a poke. He asks you the nature of the information before he grants immunty, and if you don't provide it, you don't get immunity. And if you don't provide what you say you're going to provide for substantial assistance, then you won't get the recommendation of the State Attorney. But you will know prior to ever having your client come in and sit down and tell the State Attorney what he knows, by telling the attorney, the State Attorney the nature of the information, whether or not he would consider that substantial.

REPRESENTATIVE HABEN: Mr. Chairman, if I might, to sort of resolve some issues, there have been two or three items raised that I think, perhaps, there is an answer to, and I think Mr. White has touched on a couple of them.

Representative Fontana raised a very valid, if not objection, at least a point, and that is, what do you do if you reverse the process, if you catch the principal and the principal now says, okay, here's what I'm going to do. I am going to testify, and even though you are after me, and that's the purpose of the statute, I am going to escape liability.

I think you have got to look at one thing. If you think that you have a top man caught and convicted, you don't have to go to him and ask for any statement. You just don't interrogate, and if you don't interrogate him, he can't comply with the statute. If he doesn't comply with the statute, he can't avail himself.

Number two, as far as catching someone on the lower

end of the spectrum, and if you truly believe that he does not know anything; and remember this, you know, the prosecutors still have their own devices. And it's just like everybody wonders, well why does the mandatory minimum work? Well, it works, but there are a lot of cases filed under a different section of the statute and they don't file under the mandatory minimum, do they, in the 12th Judicial Circuit? So you see, that's another way around it. But I think the largest objection goes with what Representative Martinez just raised, but let me suggest something to you, and I think Mr. White touched on it. The first time somebody turned state's evidence and the State Attorney sticks it in his ear, that word will go out, whether it be in Hillsborough County, or any other circuit in this state, and if that happens, I think no one will ever want to turn state's evidence again, and I think that word will get out quickly enough, so that, you know, if you can't trust your State Attorney, who can you trust? But if he ever does take advantage of the information and then refuses to do this petition situation, I don't think he'll ever get to use it again, and I think by the time the press gets through with that number, I think the State Attorney is probably going to have some serious problems. And what you raise may well be valid, but I think what Mr. White says, probably, may be the better reasoned argument, because he's saying don't let us turn this into a mini-trial, because when I represent a criminal defendant, which I used to do, you went to the State Attorney and said, look, if I do, and incidentally, all these people are going to have attorneys, because with this amount of money, the syndicate or the organization is going to provide them with money, so if that be the case, they are going to be represented by very good legal counsel. So, therefore, the deal will be struck, as Mr. White suggests, between the State Attorney and the defense counsel. So, he has no objection, that's the way plea bargaining takes place right now. You don't know what you're going to get, the judge allows the State Attorney and the defense to work

something out, come back, indicate what it is, there's a conviction and then there is a sentence based on what that arrangement is, so I don't-I don't think that's really going to be a problem.

MR. CHAIRMAN: Representative Smith.

REPRESENTATIVE SMITH: I would take a different tact, and I might, that there is-does live within our society a rather liberal element. I'm concerned about the other standpoint, and it stems on the word substantial. How about the guy giving just so much data, and he gets off? And without, you know, giving us something of substance? And what is "substantial?"

MR. WHITE: If I may respond to that, first of all, the State Attorney, who is, of course, the elected representative of the law enforcement community, has to make a decision first that what he is given is substantial. Then the bill provides that the arresting agency can come in to be heard aggravation or mitigation, and they can tell the court, "No, this isn't substantial, we don't think it is," and explain their reasons. Or the state-or they can come and tell the court, "Yes, we do think the reasons are substantial."

At that stage of the proceedings you have two people, the State Attorney and the input from the law enforcement agency, to indicate to the court whether or not they think that was substantial. If you had it so that the defense attorney could file the motion, then he could initiate the proceedings that would be before the court without the State Attorney ever passing on the substantial nature of the information, or the arresting agency ever passing on. Many times, that feeling is based on tons of intelligence information about whether or not-for criminal syndicates, all we need to topple them is that much information. In other syndicates, we may need a mountain of information to be able to topple them. So you've got to leave that decision making process with the State Attorney and with the arresting agency.

REPRESENTATIVE SMITH: Yes, so then if I

understand correctly, Mr. White, if the State's Attorney suggests some kind of a leniency, the arresting agency can at that point, if they feel such stop it right there, go no further.

MR. WHITE: They can come before the court at the hearing time, and tell the court that, "We don't believe it's substantial." Now, in my past practice, the State Attorney always; and it changes, I know there is some disagreement in some circuits, but in most circuits, the State Attorneys try to work with the law enforcement agency, especially in a major case, to make sure what they're doing is consistent with the intelligence that the law enforcement agency has and where they want to go. Your staff has adequately drawn in a check to even that consideration, so that if there is a gripe down there in the law enforcement community, that's going to be heard by the judge, and he can take that into consideration.

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: I raised this point about what is substantial and its specificity angle, and it took off. Now, I'm not sure we've settled that, but let me change the subject, and maybe this one will take off. What makes you think that this will be a deterrent; or that is to say, what makes you think that this cannot be (end of paragraph illegible).

MR. WHITE: Well, we know that-we have human nature to some degree. There are many of us who'd appreciate an 18-month break in our affairs, and salary during that time.

We're looking at - if I were working for a major supplier, for instance, and they happened to catch me, and he said 18 months, we'll look after you, everything's fine, that's one thing. But when they start talking about 15 years, and they'll look after me, we start having major problems. So, as these mandatories build up, we're talking about, for instance in marijuana, we're talking about five tons, 10,000 pounds, being a fifteen year imprisonment. All the case that I've handled have been in excess of five tons.

When we're talking about taking a person and putting them in prison for fifteen years unless they cooperate, I don't know what inducement that major supplier can make to that person to encourage him to stay in prison for fifteen years. Maybe he can try to kill him if he doesn't. But we've got that problem across the board. We've got that threat in every case.

REPRESENTATIVE SAMPLE: Well, isn't that going to increase that kind of threat, I guess my question should have been.

MR. WHITE: That very well may be, and hopefully it'll decrease the number of people willing to become engaged in assisting these people in smuggling, when they realize what they're looking at.

VOICE: I have a problem in the amounts. You're going to just have a lot more small shipments coming in.

MR. WHITE: We find, right now, that the large shipments are killing us. And someone brought up the question of violence. I hope that-let me respond to that.

In Miami, Dade County, Public Safety (inaudible) reports to us that in the last year they had 59 unsolved murders, which are rising from drug-smuggling operations. I don't know how many of you are aware or recall the Sandy Creek murders. In that case, two, well, a fourteen and fifteen-year girl and their two dates happened to accidentally drive up at a drug off-loading operation. The off-loaders, these little men that we're referring to, took these children, bound them, gagged them, took them to a dark sinkhole, and shot them in the back of their heads, throwing their bodies into the sink.

Now, this is the mentality of the people that we're dealing with, from top to bottom, in these organizations. So, the propensity for violence, now, is great, in terms of toward the general public. There are places in Florida, right now, I'll be frank with you, that I would be afraid to drive up in the late evening, if I were to run into one of these major off-loading operations.

If we can-the big money is in the big load. And that's where the danger is right now. They might lower the

amounts to try to bring them in in various-

(Some testimony lost due to poor taping.)

MR. CHAIRMAN: Representative Sample.

REPRESENTATIVE SAMPLE: Sheriff Beard, may I ask you, in that case that you stipulated there, do you think had you had this bill at the time, that you could have gotten those sailors to squeal?

REPRESENTATIVE BEARD: I think it would have been a weapon that we could have used to make them talk. They have a choice in this bill, isn't that it? They either do this time, fifteen years, or they get a chance to-

REPRESENTATIVE SAMPLE: Do you think they knew something that they could tell you?

REPRESENTATIVE BEARD: I think they did.

REPRESENTATIVE SAMPLE: And this would have produced it?

REPRESENTATIVE BEARD: Right. I don't think people that kind of property into their hands without them having direct contact with them.

REPRESENTATIVE SAMPLE: And you think this bill would have produced the information you want?

MR. CHAIRMAN: Robin Gibson.

MR. GIBSON: On a whole other item, which I think the lawyers and prosecutors among us could understand it, but as I hear the discussion I think this might be helpful.

In the system, as we go along here, there are three stages. In the third stage, we have a void and we need help, because minimum mandatory, as Mr. Haben is talking about, is counter-productive. Let's just go quickly through the three points.

At one point, the State Attorney has, before the action is filed, the option as to whether he grants immunity. He's in a good bargaining position. The court is not a factor and he can say, if you will help me convict somebody more important, I will grant you immunity. He has that power at that point, right then. Then he can grant the immunity. We're in good shape on that level.

The next level, the action is filed, and it is before

sentencing. At that point, there, the State Attorney can say, well, this action has been filed against you, it's now up to the court to sentence you. The best I can do for you now is, if you want to give me information to help me with somebody else, is point this up as a mitigating circumstance to the judge, and recommend a reduced sentence for you. And that's done upon many occasions, and is extremely helpful, and we have the machinery for that.

Now, the conviction has occurred, and the sentence has been pronounced. And the man goes off to jail. This is what the big man really wants, because he's been taken out of the system, and he can't hurt him anymore. We have a void, now. There's no way to reach him. All we're dealing with these people now is with the Parole and Probation Commission; are they good people in jail? And lots of times, of course, they're wonderful people in jail. All kinds have been sentence to get out.

So, they're model prisoners, and we have just, with a minimum mandatory that Mr. Haben is talking about, we have just done exactly what the higher-ups would like to do; we have put these people off in jail, away from where they can hurt the people that are higher up.

Now, this bill comes in, and fills this void. It says that, and gives us a new tool, and it says if you're in jail, and when the steel bars close is when these people really start thinking, you're in jail now, there is a tool that didn't exist before. When the reality of this thing sets in on you for the three years to five years to ten years, and you want to cooperate, we now have a vehicle by which you can cooperate.

Many of these people are not believers until the sentence is actually pronounced, and then we would have the opportunity to take full advantage of the information these people could give us, and our system's one, two, three steps, all the way along the line, would have the strength that weneed for it.

REPRESENTATIVE FONTANA: Mr. Chairman.

MR. CHAIRMAN: Representative Fontana.

REPRESENTATIVE FONTANA: I would just like to basically go along with the sheriff, Beard, as far as the bill goes itself. I think the key to the whole bill, as you just heard explained, is the conviction is already there. There's no deals made prior to the time that the person is convicted. And I think that the key to the whole bill, and to what they're trying to arrive at, is, once that man is convicted, so I agree with Sheriff Blackburn, so bring in all the little mules. Finally, we're going to run out of mules. And, these people have got a jail term facing them, and I don't care, you know, how much money organized crime has, they can't afford to put everybody on the payroll. And I think that we ought to, at least, give the opportunity. So let's try this for a year or two. I'm sure it will show some success, one way or another. If not, we can always repeal it.

MR. CHAIRMAN: Let me - we have one technical amendment we need to put in that the Xeroxing took some words off, on page 4, line 12, "reduce or suspend sentences", inadvertently left off by the Xerox machine. Without objection, any questions? Page 4, line 12.

VOICE: After the word "may"?

MR. CHAIRMAN. After the word "may".

REPRESENTATIVE EASLEY: Yes, what does go in there?

MR. CHAIRMAN: "Reduce or suspend the sentence."

Without objection- any objection? Show the amendment passing without objection. Representative Smith.

REPRESENTATIVE SMITH: I'd like to bring this to the bottom line. I really would.

I'm a criminal defense attorney, and I've practiced a number of years doing that kind of work in addition to some others. I've also been involved in the PTA's, being a past president, involved in the juvenile justice system a couple of years, and I'll tell you the truth, it hurts me desperately every time I hear that people say we haven't got the funds, we haven't got the manpower, we haven't

got the money to stem this ever-increasing tide. And I turn around and I see children by the hundreds hooked on drugs from cannabis all the way up.

I am not yet convinced in my own mind that cannabis either does or does not start them on the road to the more habitual and addictive drugs, but, in any event, I believe it's a link in the chain to some degree. We have a problem in my county and many other counties in this state, where children who run away, for a number of reasons, from home, wind up in the drug train because their minimal contact with social and economic circumstances prevents them from making the kind of decision that they ought to make. The either get recruited to be in it, or because of peer pressure, start in it.

We must take some stand. If we haven't got the dollars to be able to totally, as an army of law enforcement, get into the fight and beat them at their own game, we ought to take some other steps which don't cost us the money. This is a totally no-fiscal-impact type of bill, it seems to me, and I, frankly, have two children who are growing up. I'd hate like hell to have to some day look at my kid and stand him before a judge in my county, because he started smoking, and have to look at him and think that I had something that I could have done, and didn't do it, for whatever reasons I would have had.

It doesn't cost us anything. It's about time we standing toe to toe with these people and slugging it out. We have been made the laughingstock of the United States. We are the importers, in an indirect sense, because we don't have the ability to police our own borders, on the sea, especially, and whatever tools are available to us should be maintained.

Now, as an attorney, this bill wouldn't bother me at all, because, quite honestly, you make the punishment greater you make the fines greater, you're going to increase the lawyers' fees. There's nobody here that should be concerned about that, and I'm certainly not.

Now, that's not meant at anybody - I mean, as an attorney, I don't - you know, we convict them - if they're defended on one charge, they're defended on another charge, this is just another way of being able to get to them, and I would urge everybody around this table to say, damn it, it's about time that we really did what we have to do to get ourselves out of this terrible situation we're in.

We cannot keep everybody looking at us, waiting for us to do something, while these people run rampant over us, and I'm just ready to vote on it right now.

VOICE: Mr. Chairman, move the bill.

MR. CHAIRMAN: We have a motion for the previous question. Let's take it, that order.

REPRESENTATIVE MARTINEZ: I have an amendment.

MR. CHAIRMAN: We can take up the amendment now, Representative Martinez, but the staff advises me, and I concur that it's not technically in order. I know what you're trying to do; I don't think it'll - it doesn't fit on line 4 - page 4, line 6, where you want it to fit.

REPRESENTATIVE MARTINEZ: Well, which bill are we talking about, Mr. Chairman?

MR. CHAIRMAN: We're talking about number 16.

REPRESENTATIVE MARTINEZ: Is that the one with the staff summary attached to it?

MR. CHAIRMAN: It's number 16. On the front page, it has to say "Proposed Committee Bill Number 16."

REPRESENTATIVE MARTINEZ: Is this it?

VOICE: Thats's it.

REPRESENTATIVE MARTINEZ: Look on line 7, page 4.

VOICE: Your amendment, I believe, proposes that before the words "state attorney" you insert "the defendant cr the state attorney", right?

REPRESENTATIVE MARTINEZ: Right.

VOICE: Well, if you keep on reading, it says, "the defendant may take into cooperation any account." He can't take into account any of his cooperation, it's got to

be the State Attorney. And by putting "the defendant or the state attorney may take into account the cooperation", it doesn't fit in there.

REPRESENTATIVE MARTINEZ: Mr. Chairman, I don't want to belabor it. I just want to say one thing, if I may, if the Chairman will allow me.

Gentlemen, I think maybe my intent has been misinterpreted. I'm going to vote for the bill, there's no question about voting for the bill. But, knowing the law as I know it, I think, and the purpose of committee meetings is so that we can all discuss these things. If the committee doesn't want to go into it, it's fine with me. I'm going to vote for the bill, regardless of however it goes. But these same people that we're talking about, all this money, the first that anyone has this applied to him doesn't get what he wants, you're going to have a challenge of this bill, and money's not going to be an object, and the tool which you seek so vehemently, and I agree with you, I think it's an excellent concept, but I just personally feel that there's no one that can count on this bill doing what it thinks it's going to do without giving some assurance to the defendant that if he's going to cop out, he's going to have an opportunity to show that he did the best he could, because his life is going to be on the line. I'd rather spend 15 years in jail than be found in some Dade County-in the trunk of some airport, four or five days after my wife has missed me. And I think, when the judge sentences anyone, regardless of whether it's a plea-bargainer or not, he tells that man, you have 30 days in which to appeal this sentence, and if you think that if the guy who cooperates desn't get what he thought he was going to get, and they slap him because the policeman said, he didn't tell us everything we wanted to know, we think he knows more, and he has no opportunity to show that he's done everything he can, you're going to have a flaw in this bill, and what we've attempted to do with this bill is going to backfire, and we're going to be right where we are now, and I suggest to the fine gentlemen to look at

that aspect and, you know, I don't want to belabor it anymore, I just thought that that's what committees were for. But we'll vote on the bill, and I want to vote for the bill, but I want to caution everyone that we're - we might be acting too hastily with going full steam ahead in our endeavor to do what's right, and leave this thing so that you've got the tool, and it's like one of these little tools I was using a clamp to fix a drawer at the house, and I turned the clamp just one more turn and it snapped, because I tightened it too much. I'm afraid that this clamp we think we're imposing will backfire, and we're going to be right back where we are, and we've lost a tool.

I don't see anything wrong with giving it some consideration, and we do have a thing known as due process. I just think that this falls a little bit short of that, and we're going to have a lot of repercussions and we're not going to really do what we think we're doing.

I like the concept, it's a good bill, and in order to satisfy my good friend Sheriff Blackburn, I'd like to have the privilege of moving the bill.

MR. CHAIRMAN: We have a motion then from Representative Martinez to move the bill. Question is now on the bill, Proposed Committee Bill number 16. The secretary will call the roll.

COMMITTEE SECRETARY: Representative Beard.
REPRESENTATIVE BEARD: Yes.
COMMITTEE SECRETARY: Representative Easley.
REPRESENTATIVE EASLEY: Yes.
COMMITTEE SECRETARY: Representative Fontana.
REPRESENTATIVE FONTANA: Yes.
COMMITTEE SECRETARY: Representative Kershaw.
REPRESENTATIVE KERSHAW: Yes.
COMMITTEE SECRETARY: Representative Martinez.
REPRESENTATIVE MARTINEZ: Yes.
COMMITTEE SECRETARY: Representative Reynolds.
REPRESENTATIVE REYNOLDS: Yes.
COMMITTEE SECRETARY: Representative Sample.

REPRESENTATIVE SAMPLE: Yes.
COMMITTEE SECRETARY: Representative Jim Smith.
REPRESENTATIVE SMITH: Yes.
COMMITTEE SECRETARY: Representative Larry Smith.
REPRESENTATIVE SMITH: Yes.
COMMITTEE SECRETARY: Representative Tygart.
REPRESENTATIVE TYGART: (no response.)
COMMITTEE SECRETARY: Representative Williams.
REPRESENTATIVE WILLIAMS: Yes.
COMMITTEE SECRETARY: Chairman Crawford.
MR. CHAIRMAN: Yes.
Okay, by your vote, the bill passes.
(Whereupon, the Committee was adjourned.)

CERTIFICATE

STATE OF FLORIDA
COUNTY OF LEON

I, JERRY L. ROTRUCK, Court Reporter at Tallahassee, Florida, do hereby certify as follows:

THAT I reduced the tape recorded record of the foregoing proceedings to typewriting, or under my supervision, and that the foregoing pages 2 through 43, both inclusive, contain a full, true, and correct transcript of the proceedings on said occasion;

THAT I am neither of kin nor of counsel to any parties involved in this matter nor in any manner interested in the result thereof;

This 14th day of September, 1979.

[S] Jerry L. Rotruck, CM
JERRY L. ROTRUCK* CM.

Court Reporter and Notary Public, State of Flordia at Large.

My commission expires 11/20/81

SENATE PRESIDENT: Senator Myers, 37.

SENATOR MYERS: Yes, Mr. President, I respectfully withdraw my motion. I have determined that it would take a two-thirds vote, and it-and out of respect for the Senate, I don't want to hold up debate on this measure.

We ought to debate it and dispose of the matter one way or the other.

SENATE PRESIDENT: Senator Spicola, are there any other amendments on the desk?

SENATOR SPICOLA: Well, we have to adopt that one, I believe, Mr. President.

SENATE PRESIDENT: Have we already adopted the principal amendment?

SENATOR SPICOLA: Right, and -

SENATOR SPICOLA: All right, there is a title amendment on the desk.

SENATE PRESIDENT: That has been adopted.

SENATE PRESIDENT: Senator Gordon, do you want to take up - he has got an amendment to the original amendment, but it is going to have-you have to move to reconsider the vote by which it went to - by which amendment was adopted.

SENATOR GORDON: No, no. It is an amendment to the - to his amendment. We are not on third reading, but it has already been adopted, you see.

Now I can amend it. It is what is in front of us, is that right?

SENATE PRESIDENT: Oh, it is an amendment to what is non-existent.

SENATOR GORDON: I just wanted to identify where it was.

SENATE PRESIDENT: Okay. You have got the amendment. Read it.

VOICE: By Senator Gordon, on page five, line ten, insert "there is hereby appropriated the sum of $2,250,000 to increase the number of positions in the Department of Criminal Law Enforcement by 150 to

carry out the intention of the Act."

SENATOR GORDON: I have not been able-just to explain that amendment, I have not been able to get the precise figures, because the analyst on that doesn't happen to be in the office at the moment, but that is the approximate amount that the Governor asked for in his budget to go along with his program of drug law enforcement.

And I think just so we understand the implication and some direction to the sub-committee, I think it is an appropriate place to put this amendment.

SENATE PRESIDENT: Senator from the 22nd, for what purpose do you rise?

SENATOR SPICOLA: To speak in opposition to the amendment.

SENATE PRESIDENT: For what purpose does the Senator from the 1st rise? Senator from the 22nd is recognized, then the Senator from the 1st.

SENATOR SPICOLA: Senators, I hope you realize what this is.

This is a method to do indirectly what they couldn't do by the point of order that was raised earlier.

I think appropriately that that budget item ought to be considered in the budget. That is the way we have done it in the past. There is, the Governor's proposal is much broader than just drug trafficking. It deals with the whole gamut of state attorneys, FDLE, the whole law enforcement area.

And it is just a method to tie an amendment onto the bill that will, if you do adopt it, it will be then subject to a point of order and have to be referred, and it will railroad this bill, and I hope that you will see it what it is and I hope that you will vote it down.

SENATE PRESIDENT: Senator from the first.

SENATOR CHILDERS: Yes, Yes. Mr. President, and Senators, the sub-committee on general government, sub-committee A, in Ways and Means, has addressed this issue, I guess, maybe for the last month, and we are committed, every member of the committee,

sub-committee, which is the committee chaired by Senator Gordon, we are committed to fund the Department of Criminal Law Enforcement, the Department of Law Enforcement, a crack team that the Governor wants, whatever is necessary in order to stop the smuggling in Florida.

We don't want the reputation, but if this amendment is adopted, then it would go back to Ways and Means.

Now, the sub-committee is totally committed to fund at whatever level is necessary, whether it is a million, or five million dollars.

The enforcement of the bill and we are going to do it. We have already tentatively put it into the budget. We have got the Department of Natural Resources with investigators for drug smuggling.

They have got in every, in every area they have got drug enforcement officers. The Game and Fish Commission is working on it. They work in conjunction with the Department of Agriculture, and then the primary agency is the Department of Criminal Law Enforcement.

That is where our effort is being used to back up that agency, that department, to give them the necessary tools that they need, the manpower to stop the drug smuggling in Florida, so we are going to do it.

It will be in the budget. No one knows exactly what it is going to require, but we are fully committed. I think every member of the sub-committee is fully committed to see that the Department of Law Enforcement is adequately funded, and that is a proper place.

SENATE PRESIDENT: Senator from the 10th, are you speaking - you were on your feet a minute ago. Do you want to speak?

SENATOR DUNN: No, sir.

SENATOR PRESIDENT: Okay, Senator from the 28th.

SENATOR CHILDERS: Mr. President, I would also like to reiterate the fact that I think everyone knows that Senator Gordon is opposed to this bill and the fact that I think he has made several efforts to legalize marijuana

and I think this is just another ploy to delay it and I would hope that we are to defeat the amendment.

SENATE PRESIDENT: The Senator is recognized to close.

SENATOR GORDON: No, I don't want to withdraw it. I think it is important for everybody to know the cost of this most useless of the crusades that the Governor is asking us all to embark on with him. All we are going to do is spend this much more money as you heard the sub-committee chariman say for the Department of Criminal Law Enforcement. But everybody else wants to get into the act so, we are going to give more money to the Department of Natural Resources, because they have those boats out there and airplanes and now the Game and Fish Commission want to catch the river smugglers, I guess, because they're on fresh water versus the saltwater smugglers that the Natural Resources is going to get, and work every other agency that can find its way into this act is going to join in this bonanza to pursue a totally illogical course. What impressed me about the Governor's proposal was, that he said that this is an economic crime and I know the Governor well enough and I know his knowledge of economics will enough to know that he didn't really analyze the economics of this situation. All you're going to do when you increase number of illegible people involved in law enforcement is that instead of confiscating, as is now estimated, five percent of the marijuana coming into this State maybe you will raise that to seven and one-half or ten percent. Or it it's now at ten percent you will go to twenty. So what will I do?

Let's just do a little basic course in supply and demand. The demand is out there, obviously. There are thirty or forty million Americans who are regular users of marijuana according to a variety of people who ought to know. The sponsor of the original bill, Senator Childers, pointed out that it's a five billion dollar business in the State of Florida.

So, obviously that five billion dollars in coming from people who want to buy it. The demand is out there. So

when you restrict the supply by throwing two million, five million, eight million, ten million dollars at the problem, all you're going to do is those smugglers that are successful are going to charge a higher price and make more money.

So all we are doing by this business of over-regulating this illegal business is driving up the price. Much the same thing that Senator Dunn has been pointing out with the over-regulation in certain of the areas of professional occupational regulation.

You restrict the number of people who can practice, it drives the fees up, exactly the same thing here. I'm just telling you I know that for many of you, the emotional issues surrounding the question of the use of drugs and the assumption that that's where popular opinion is, leads you down a dead end path like the Governor is asking us to go. Because we think that's what is popular.

I have been talking about legalization for a long time and I've yet to receive very many critical letters from my consitutents, or from anybody in the community. And, I am perfectly able to survive in a very heterogeneous community, survive politically with this kind of view. I take it simply to point out to you that I am utterly convinced that the public is far ahead of the legislature, and far ahead of the Governor in understanding marijuana use.

I am not talking about cocaine or heroin, I'm talking about marijuana. That marijuana use is as pervasive as the illegal use of whiskey, beer and wine was in 1925, or 1927 or 1929.

It is not going to be able to be controlled, and you just wasting tax payers money and creating tremendous profit for crominals and organized crime by making it more difficult so the pay-off has to be bigger and the business gets more monopolistic.

Organized crime arose in this county out of the ill profits on liquor, because they are the ones that organized the business, and they brought it together and they were able to do it in spite of any law enforcement

attempts because people wanted to take a drink.

In this day and age people not only want to take a drink but a lot of them want to smoke. To try to stop them by spending eight million dollars or eighty million dollars or fining them, whatever these fines are, which incidentally don't go back to the state, but go to the local government, so there is no offset, is just sheer foolishness.

I just want you all to know speaking as, as somebody who knows something about economics and someone who is fiscally conservative, you are throwing money down the drain. You are making a fortune for people who are breaking the law.

Neither one of which are things that you would ordinarily do if it was another subject that didn't have this emotional overtone.

You would never, never throw away money like this and you would never, never turn around and consciously raise the profits of people in the illegal business.

You would never consciously assist organized crime. So, I'm asking you to do in thinking about this bill and other bills about it, is try to strip away your emotional concern and just think about it as a very simple problem. That this is what human behavior is, we may not approve of it, we may not like it, but a lot of things happen in this world that we don't approve of and we don't like that other people do approve of and do like. We can't change everybody's behavior to match our own. That's number one.

Number two, we don't want to create a situation in which the people who are doing the illegal things are making money and even making more money because of the kind of money we are spending in law enforcement to raise their prices.

That is essentially what this whole silly, emotional notion of throwing some money into law enforcement to cut down trafficking in marijuana is going to do. I think it is silly and stupid and the Governor and the people who support him in this generation is going to look awful silly in the history books. Just like, if you go back and

read the actions of the prohibition people in 1920, 1925, it is absolutely hilarious when you read it. All of us are also going to look that way in the history books, ten, twenty, thirty years from now.

So, I am asking you to be rational, put on your economic hat. Look to save the money. Use some creative restraint. Be creative in terms of changing your notion about what's to be done with marijuana. Be creative enough to see that it ought to be legalized and taxed so that we get the money. Show some restraint in expanding the bureaucracy in Law Enforcement, Department of Natural Resources, Fish and Game Commission, State's Attorney, Public Defenders, Departments of Correction, County Jails, Sheriffs, City Police Departments, all of those things, all you are doing is adding up the price.

Thank you Mr. President.

SENATE PRESIDENT: Senator from the 7th had a question?

SENATOR SCARBOROUGH: Mr. President, I wanted to make some remarks, I didn't realize that the Senator -

SENATE PRESIDENT: The Senator was closing.

Senator Gordon was closing.

SENATE PRESIDENT: You want to-I don't want to get Senator-

SENATOR GORDON: I'll waive any further-

SENATOR SCARBOROUGH: Thank you, Senator Gordon. Thank you Mr. President.

SENATE PRESIDENT: If you think Senator Gordon - wait until Senator Gordon gets his marijuana bill up here if you think that was a speech, that was nothing. He gets really wound up in a few minutes. Go ahead Senator.

SENATOR SCARBOROUGH: Mr. President, Senators, I want to fully understand that from a personal opinion, I think that the jury is still out on the dangers of the use of marijuana. I don't advocate legalization of marijuana or any of the things Senator Gordon said, but I want to share with you for a moment some experiences that I have experienced with mandatory jail sentences.

We have many new Senators here this morning that may or may not recall that in 1968 or 1969, the Florida Legislature through a waive of emotions imposed three year mandatory jail sentences on anyone caught with any marijuana whatsoever. We thought we were doing the right thing.

President Jerry Thomas came along about two years later and took the Senate on a field trip to Apalachee Correctional Institution, a few miles west, and let us view firsthand some of the people that we had placed in the prison system for three years with no chance of parole. We were appalled at what we had done.

We recognized that by taking this latitude away from the courts, that the only thing we could do, sensibly, was to come back and repeal that particular three year mandatory jail sentence law.

It was a very difficult thing to do, because the wave of emotion throughout the United States was still very strongly against marijuana.

But the Legislature stood very tall in that hour and did what was the right thing and repealed that ridiculous three year mandatory jail sentence requirement.

Just a couple years ago we went through the same thing with the use of a firearm in the commission of a felony.

Now, many of us thought at that time, that that would stop or slow down or arrest many of the armed robberies that were taking place in our communities, both large and small.

I don't have any figures as to whether or not the number of armed robberies has been retained or restrained, but let me tell you what I am convinced of.

The number of unwanted, needless murders with people that are robbing stores, supermarkets, gas stations and what have you, throughout Florida, has dramatically increased.

About a mile from my home in Jacksonville, there's a small curbside market. About two or three years ago two armed robbers, about five o'clock in the afternoon, entered this little establishment with .38 pistols, herded

the woman of the owner, who was tending the store at the time, and a customer into the cooler after having robbed the cash register of a hundred dollars or so.

Shot both of them in the back of the head; miraculously they both lived.

It was stated at that time, by one of the people, "Leave no witnesses. With a mandatory jail sentence the best thing to do is to exterminate those right there on the spot."

We have had throughout Florida and in Jacksonville, that I can recall, many, many similar instances where human beings lives were needlessly snuffed out, because those criminals knew that if they left a witness they faced a mandatory jail sentence.

We had one within three weeks ago, a young woman, mother of small children, abducted in a 7-Eleven, two or three o'clock in the morning, needlessly murdered.

These two people were apprehended, not because of the fact that there was no witness, but the fact that someone got scared and went and told the Sheriff about it.

Now, let me tell you what concerns me with mandatory jail sentences like this. Twenty-five years for over a thousand pounds, or whatever the case may be.

[Illegible line] is not because of one point or two point or five point million dollars for enforcement beef-up. But we will have to double the death benefits for all of our law enforcement officers in Florida. Can you imagine for one moment what will happen to an agriculture station somewhere out on the highway late at night and a truckload of marijuana comes through, and that unarmed agricultural inspection officer chases him down and he's got two thousand pounds and knows if he's caught that's twenty-five years. Do you think he will hesitate for one moment to snuff out that man's life?

I submit to you they will not. I believe that there are better ways to do what Senator from the 22nd wants to do. And as pointed out by Senator Childers, I think all of us are strongly committed to beef up our enforcement agencies, give direction and give some hard words to the

courts to impose stiffer and longer sentences for those involved than it is to take away the cornerstone of one of our branches of government and say that you do not have the latitude or the intelligence to impose sentences as they should.

For those reasons and many more, Mr. President, I know that this is an emotional thing and the Senate's going to think in the eyes of the world we are doing right, but I submit to you if we do what obviously will happen here this morning, some Senate and some House in future years will come back and undo this as the result of the unwarranted slaying of many of our police officers in Florida.

Senator Myers: Mr. President, purpose of my rising is a parliamentary inquiry. We've been hearing a lot of final arguments on the bill and really all that we're on now is an amendment relating to an Appropriation. I simply want to reserve some time to speak on the merits of the bill after we dispose of this amendment.

SENATE PRESIDENT: Does everybody understand the amendment of the Senator from the 35th is an amendment to increase by two million dollars in the Department of Law Enforcement.

Those in favor of the motion, signify by saying aye. Opposed "No".

Amendment is defeated. Voice by Senator Myers, on page three, line seventeen through twenty-three, strike those lines and renumber subsequent sub-sections.

SENATE PRESIDENT: Senators' recognized to explain the amendment.

SENATOR MYERS: Mr. President, Senators, this amendment strikes from the language of the bill the portion that says that the sentence, the three year mandatory minimum sentence shall not be suspended, modified, or revoked, and it allows the Judge in his discretion in case, on a case by case basis, as we do with a murderer, to determine whether there's going to be - or the Parole Commission - to determine whether there going to be a parole sometime during the three years, or probation or set forth by the Judge, initially.

What we are saying in this bill to prosecutors is, that if you use this statute, you must send the person away for mandatory minimum sentence of three years.

Prosecutors have consistently told us that mandatory minimum sentence statutes are useless, because many times they can't get juries to convict and they don't like to use them. And in all probability they will not use them. They have very seldom used the gun statute that we passed, as you see in the fiscal note here.

So, number one, it is futile to put a statute on the book that your prosecutors are reluctant to us because they don't have the right tools that we will intentioned, wanted them to use.

Second of all, it is ridiculous for us to sit here as a Parole Commission, a doctor, a psychiatrist or correctional officer, and act as a legislator, a judge and a parole commissioner or a corrections officer all in one hat in saying that we have the facility to determine when a person in prison is able to be rehabilitated or is able to provide us with certain information to lead a taxpaying citizen's life or not before the crime is even committed.

Third, you might be interested to know that we don't even provide mandatory minimum sentences for murderers, except for one where there's a twenty-five year mandatory minimum sentence for robbers, for burglars or for all the other heinous crimes you see in the books that are felons now. You don't provide mandatory minimum sentences, but yet you say you're going to provide a mandatory minimum sentence for what is commonly deemed to be a non-violent crime.

Now, Senators, lest this get to be an argument, seemingly an argument between pro-pot-legalization and anti-marijuana people on the floor, let me just tell you, number one, that I have a great amount of respect and admiration for Senator Donald Childers and Senator Spicola, as a matter of fact I have co-sponsored a bill this season with Senator Childers to raise the drinking age back to twenty-one. (Illegible line) that bill because he wants to put it into another form, but I may pursue the bill anyway, because I strongly believe we ought to that

we were a little precipitous in lowering the drinking age when we lowered the age of majority down to eighteen. Let not this argument on this floor get into an argument between hard-line people on crime, hard-line conservative versus liberals, pro-pot versus anti-pot, because that is not the case.

Look at a criminal statute from the stand-point as to whether or not we really want to carry out, whether it will really carry out our intent and purpose and what we want to do.

If you have a law that is so rigid, that it's unusable by prosecutors or the courts, then it's counterproductive to say that you're really doing anything worthwhile in trying to stop drug smuggling.

And all of us on this floor, I believe Jack Gordon included, in spite of some adverse remarks that were made a minute ago, which I do not think were appropriate, are against crime, against drug smuggling, against drug trafficking, that's not the issue here. The issue is whether you have an appropriate workable criminal statute that our prosecutors and courts and prisons can use and that our legislature can be proud of in the future to say that we weren't just soap-boxing and making political speeches, but that we were really giving somebody a tool to enforce the law that we want to be enforced.

SENATE PRESIDENT: Senator from the 22nd for what purpose do you rise?

SENATOR SPICOLA: To oppose the amendment.

SENATOR PRESIDENT: Senator from the 30th? Senator Poole.

SENATOR POOLE: I just had a question of Mr. Mye[illegible]

SE[illegible]ATOR SPICOLA: I yield.

SENATOR POOLE: Senator, yesterday in the committee, we had testimony on this bill, and would you believe me that the prosecutors were there represented and they were very much in favor of this bill, as well as all of law enforcement.

SENATOR MYERS: Well, no, Senator, I really don't

believe that. I might believe that some prosecutors in some counties are in favor of mandatory minimum sentences, but you will find -- I've been on these committeess for fifteen years -- that the prosecutors are split, and a majority of them will tell you, in appropriations and otherwise, throughout the course of the years, that they do not like mandatory minimum sentence. Mr. Gerstein, for years down in the 11th Judicial Circuit, has told us for years that he was never able to utilize well mandatory minimum sentences and he doesn't like them.

There are other prosecutors who will tell you the same thing, so you might have had some that said that, but I will tell you that there is not a unanimous opinion among prosecutors about mandatory minimum sentencing.

The mandatory minimum sentence goes two ways:

One is up front, the Judge can't put anyone on probation -- that may or may not be wise. What you are also saying is that the person cannot be paroled.

SENATE PRESIDENT: Are you finished, Senator?

SENATOR POOLE: Yes, sir.

SENATE PRESIDENT: Senator from the 36th, for what purpose do you rise?

SENATOR STEINBERG: I would like to speak against the amendment.

SENATE PRESIDENT: For what purpose does Senator Dunn rise?

SENATOR DUNN: Against the amendment.

SENATE PRESIDENT: Senator Spicola recognized first - Senator from the 36th, then Senator from the 10th.

SENATOR SPICOLA: Mr. President, Senators, briefly this is just another amendment by the few on the floor here that have what I feel are not the strong prevalent view of constituents as to our drug laws that will actually in this amendment, actually goes to the heart of this bill, because, if this amendment is adopted you, in effect, will go back to the existing law. And, if it's adopted, the whole concept behind this bill -- the whole idea that when this guy that pilots the boat in or pilots the plane in, that when he is apprehended and when he is

sentenced to a minimum mandatory sentence, and when he hears the jail door slam shut, he will not know, if this amendment passes, he will not know that he will be in there for three years or ten years or fifteen years.

Then the whole incentive, the whole object of the bill to make him cooperate, so we can for once move from just apprehending the mules and can move up to the thoroughbreds, to apprehend the generals instead of the privates in this State, that will not be available and with this amendment there is no sense in passing this bill.

Now, under the law, and Senator Myers knows this, if this law is passed -- under this law the prosecutors still have the option of other existing drug laws and they can pick and choose, but they are given this option.

And, we did not hear from on State Attorney -- and particularly we know of the support of your present State Attorney for this bill and your present State Attorney was instrumental in all of this program that Governor Graham has now to beef up FDLE, to beef up the State Attorneys to try to do something about this drug problem.

You know, we've heard some talk about the fiscal impact. Isn't it strange, in Dade County, I'll give you one statistic, in Dade County in the last six months, there was fifty-nine murders -- that's the county that is represented by Senator Gordon and Senator Myers. Fifty-nine murders, Senators. And the Federal Drug Enforcement Administration estimates of those fifty-nine murders, over forty were drug-related.

Now, I ask you, Senators, what is the fiscal impact of human life.

Now, you think about that when you vote on this amendment and the rest of it.

Give this to the law enforcement, Senators, they are asking for it, they need it, they deserve it, and Florida can no longer be what it is today and have the reputation of what it has today as the drug capital. I urge you to defeat this amendment.

SENATE PRESIDENT: For what purpose does the Senator from the 35th? Sir, do you yield?

SENATOR SPICOLA: I yield.

SENATOR GORDON: Senator, wouldn't it make just as much sense -- if we just did a little exercise in logic here.

Wouldn't it make just as much sense to say that we wouldn't have had forty, or whatever it was -- forty of those murders, if marijuana was legalized there wouldn't be any reason for those people to shoot each other, would there? So, it seems to me your argument could be used in either direction.

SENATOR SPICOLA: Well, you could also follow that argument, Senator, by seeing the thousands and thousands of lives, young lives, that are ruined by the used of hard drugs and other drugs, that are ruined.

And, what is the fiscal impact of those, so it could use that logic, too. If, you legalize all the drugs, as you would.

SENATE PRESIDENT: For what purpose does the Senator of the 4th rise?

SENATOR THOMAS: Point of inquiry. Will Senator Spicola yield?

SENATE PRESIDENT: Senator yield?

SENATOR SPICOLA: Yield.

SENATOR THOMAS: Senator, I want to concur with you. I don't think based on the staff analysis it would indicate to me that there's not going to be much fiscal impact on the one hand. Which would bring up the question, where does the bill really -- the statistics would indicate that some four hundred and fifty-three marijuana cases were brought into the correction system in the fiscal year of 77-78, of which of those four hundred fifty-three, ten to twenty of them were at a level of a hundred pounds or more.

Where does the bill really get to the hard-core drug traffic people?

SENATOR SPICOLA: With those few that you mentioned, those few that now may get out in a year and half, that may under this bill, sentenced to three years or ten years or fifteen years, to those that will be sentenced under this law and they know they are going to be in

there that long and they know that the general is not going to finance them and guarantee them a job for that length of time, those people may get us to have those people to cooperate and get the generals that we haven't got to under our existing law.

SENATE PRESIDENT: For what purpose does the Senator from the 20th rise?

SENATOR GRIZZLE: To ask a question of --

SENATE PRESIDENT: Senator from the --

SENATOR GRIZZLE: Senator, this bill is fine, as far as it goes, but I think there is something sadly lacking. So we're going to get the privates and the lieutenants and the corporals, but what happens to the general, I mean nothing happens to the general under this bill that's bad enough.

SENATOR SPICOLA: Yes, because, if the private squeals and if that leads to the conviction of a general, he will be subject to the mandatory sentences and those are the big ones, those are the ones that the more severe penalties will apply to, because they are accessories and principals and they would be subject to the severe penalties in this bill.

SENATE PRESIDENT: Senator from the 36th recognized.

SENATOR STEINBERG: Thank you, Mr. President. I think we're -- I think Senator Spicola said most of what I would want to say, Mr. President, but I just want to go into one area.

Senator Myers is talking that we should not use the three year mandatory minimum, which is the only thing his admendment tends to strike from the bill. Without that, however, the bill does not have the effect that Law Enforcement, the State's Attorneys and Governor Graham wants the bill to have.

What you have to realize we're dealing with other than the emotional issue, this is an economic crime.

You're talking about, in the marijuana area, a hundred pounds of marijuana. You're dealing with over a quarter of a million dollars worth of product that this person is being caught with. You're dealing with a half million

dollars worth of hard drugs based on what the bill is talking about.

These people, when your dealing with that kind of numbers, have no problems today going into the criminal justice system, the mule, the person who's carrying that amount of drugs from the airport to the distribution center that is being grabbed, and sit for six months or eight months, when he has been dealing with a quarter of a million dollars.

They wouldn't earn that amount of money on the street. In other words, economically, it's better for them to go to jail and get -- be paid when they leave jail by the person who they have been working for higher up.

What this bill is designed for, for the first time, to try to get that next run, up on the ladder. The person who is financing the person who is masterminding by saying, Look, it doesn't matter that he promised you or she promised you to cover you while you're in prison. And then when you get out of prison you've got fifty or sixty thousand dollars in the bank for you. And don't worry about the time you spent, we will take care of your family, we'll give you a job when you come out. If these people feel they're not going to get out for a period of time, they're going to have to spend that time in jail, then they might go to that State Attorney and say, Look, I'll tell you who the next one up on the rung is if you'll let me out of jail.

That is what this bill does. It allows the State Attorney and law enforcement to make a deal after the person is in jail.

This is something that does not exist today in the law. Today when you find someone guilty and you sentence them to jail, after the first sixty days you no longer can make a deal with them to let them out to get them to turn state's evidence or to do anything.

This bill says, Look, we'll put you in jail mandatorily for a period of time, but if you will help us in prosecution, we can amend that mandatory jail sentence. It's a way of using the law to help law enforcement. If you take away the mandatory provision on the law,

you're basically putting us back to square one in our drug enforcement.

And I am -- you know if -- most of you know, when I've been a member of the House I've supported the decriminalization of marijuana. That's not the issue here today, whether we're going to do anything with the felony or the misdemeanor question in the use of pot. That's not before us today.

We are dealing with sentences for the people who are transporting the large amount of drugs. We're not talking about the users. The user is not someone who's going to have a hundred pounds of marijuana in his possession, or he is going to have five grams of heroin or twenty-eight grams of cocaine. That's not what we are talking about. The average user is not walking around in the cocaine area. You're talking about a quarter million dollars or more of cocaine. Depending on the purity, you could be talking over a million dollars' worth. That's not the type of person we're getting at in this bill. And I think if you go with Senator Myers' amendment, you're defeating the bill. You've got to vote down the amendment, then pass the bill as now amended, and let's get the message out. You know, Hertz and Avis always talk about the number one, and one's striving to be [illegible line] we should strive not to be number one and this bill is a move in the right direction.

SENATE PRESIDENT: Senator from the 10th, Senator Dunn is recognized.

SENATOR DUNN: Mr. President, members of the Senate, I, too, would like to oppose the amendment pending and in the course of these comments address two of the principal issues of the bill itself.

First, let me agree with those Senators who have raised some question --

SENATE PRESIDENT: Can I interrupt you just a minute Senator? If your message -- we've already had time to debate the bill itself, so if you keep limited to that -- maybe you have to make your point -- statement, but we would like to limit it to just the amendment if we can. We'd like to move this along and get it out of here, if

we're going to get it out.

Go ahead, Senator.

SENATOR DUNN: I would say that I agree in general principle with some of those lawyers and other senators who have raised a question about the utiltiy of mandatory minimum sentences.

Mandatory minimum sentences have been used in emotional frenzies by legislative bodies from time to time to address emotional problems. They have not been generally very effective in reducing crime.

There are, however, exceptions. I served under an appointment of the Chief Justice on a committee dealing with the review of Florida's sentencing code.

One of the recommendations that that committee is recommending is that Florida's sentencing process be restructured and we go to what is called a matrix system of guidelines.

Part of the review of that committee, and part of the review that our Committee on Judiciary - Criminal last year was involved in, was an analysis of the effectiveness of mandatory sentences.

Now, Senators, I reviewed a very excellent study done by Harvard Law School on the question of the effectiveness in reducing crime by the mandatory minimum sentence provision and the Massachusetts law dealing with with gun control.

One of the first scientifically done reports that I have seen on the issue, that report indicated that, yes, mandatory minimum sentences are effective. They will reduce crime if a couple of things occur.

First, if the legislative body does not overuse and apply the concept of mandatory minimums to everything that comes down the pike.

Secondly, if the legislative body and if the Governor publicizes the fact that mandatory minimums are in fact, to be imposed in certain instances, and in those cases that study indicated that in Massachusetts there was in fact a reduction in use of firearms just as we have found somewhat less so scientifically in Florida, that with our three year mandatory we have in fact, reduced, we

believe, substantially, in my opinion, the use of firearms in the commission of certain felonies.

Now, I believe, that if we use sparingly, selectively, and rationally the question of mandatory minimums we can have the impact we desire, and that is to reduce crime.

Why would you use it in this instance? You would use mandatory minimums in this instance because, as has been pointed out by Senators Spicola, Steinberg, and others and very well by the Governor, we are dealing with an economic crime here.

We're not dealing with a simple question of possession of two or three grams of marijuana.

We're not dealing with a situtaion that occurs very frequently in this State by people who use small amounts of marijuana and consume it for their own purposes.

[Illegible line] dealing with the individuals who feed on the weakness of others.

We're dealing with the worst in society, the criminals that make their money in organized crime. And organized crime is, by definition, the organized criminal conspiracy for profit.

Now, in order to make an impact on organized crime, what we have to do is look at the causation of that economic phenomenon.

A couple of professors at John Jay University in New York wrote a good book dealing with the economic causation of crime very much in point to organized crime.

What it says, it says if you are a policy maker what you ought to be considering is how you address the causation from the point of view of the economics of it, just as Senator Gordon has pointed out, but in my opinion, quite on the other side of this issue.

They say, in effect, look at causation, look at the criminal as a rational being.

People who are in organized crime are rational, they're in it for a purpose, they're in it to make a living, and they're making substantial money.

Now, how do you cut into their business? The way you

cut into their business is to look at the cost benefit analysis. So long as we permit the benefit of crime to be substantial and the cost to be insubstantial, who would not be in business if you were disposed? Who would not be able to make a profit in organized crime in this State?

I guarantee you that unless and until we increase, the cost of doing business in organized crime, we will not keep them out of the State however much money we put in organized crime repression and suppression activities in DCLE and others.

What we need to do is recognize we're got flexibility in organized crime in the criminal justice system and look at it analytically.

Number one, as has been pointed out by Senator Spicola, a person dealing in large amounts, hundred pounds of marijuana, one ounce or more of cocaine and other hard drugs can make substantial sums of money. The committee heard testimony to the effect that these mules, the people who the importers, the wholesalers, the people connnected with organized crime can make two hundred thousand dollars a clip. Now if you can make two hundred thousand dollars a clip, you can run the risk of going to jail for eighteen months.

You can run the risk -- as a matter of fact, your cohorts in crime will pay you, as we heard in the testimony before the committee. They will pay you fifty thousand dollars to be quiet and stay in jail. And I guarantee if you can make two hundred thousand dollars in eighteen months, that's a pretty good risk for some of these people.

Now what do we need to do? We need to recognize that on the cost side we've got some flexibility in the system that is not perfect. We know there is sometimes a very unlikely likelihood that a person is even going to be apprehended.

The large shoreline that we have, the problems of importation, it's tough to catch anybody coming in here, trying to bring in large amounts of marijuana.

So there is a benefit there and they're running the risk.

They're taking the gamble. There is a benefit that even if they are apprehended they may not likely be arrested, because of the problem in making the arrest.

After they are arrested there's some flexibility in the system, the excellent battery of lawyers, there's some likelihood that they will bet on, if you will, that they will not be prosecuted or if they are prosecuted they won't be convicted.

MC-9/8/79

SENATE TAPE - COPY SESSION 4/5/79
(SENATE BILL 83)

"Read the next Bill

"Senate Bill 83, a Bill to be entitled, 'An Act Relating to the Possession of Controlled Substances'. . .

"Senator Childers is recognized.

"Thank you, Mr. President. Senators, this Bill was and is last year, the latter part of the Session, and at that time we did not feel it was a pressing issue to be brought before the Senate and also the fact that we did not have a House companion. I think the question that most people are asking today, is why do we need mandatory prison sentences for drug smugglers? According to a new recent news report, Florida's number one industry dollar wise, is drug smuggling. We have reports that only 10% of these drug smugglers are now being apprehended in the State of Florida. This means that there is a 90% chance of an individual, specially the big drug smugglers getting free, and making huge sums of money. There are several reasons as to why we are only apprehending only 10% of these drug smugglers; one is the lack of police manpower; the other is because we have hundred of miles of unprotected coastlines in the State of Florida,

and we have large areas where an airplane can land or either make drops of marijuana and other type of drugs; I've met with State Attorneys, law enforcement agents throughout the State, and they all agree that drug smuggling is the most major problem facing the citizens of the State of Florida today.

"I don't thing we can wait until next year to do something about this. I hope that all of you that are listening now and have children in our schools and high schools and in our colleges, I have reports in Palm Beach County, that there the high school students in some high schools there are a percentage of 80 to 90% of all students that are on some type of drugs. This is tearing at the very foundation of our society not only in Florida but of the nation as a whole. We are seeing that our elected officials in Washington are not taking any action on this problem, and I think now we have a chance in Florida to move forward and make sure that this here problem is addressed. Let me just give you a few example of what kind of money is involved. In Palm Beach County this past year I give you some of the figures on the amount of marijuana that certain law enforcement agencies were able to confiscate; 10,000 pounds; ½ tons; 2,000 pounds; 3500 pounds; 4400 pounds; 25,000 pounds; 9200 pounds; 15,000 pounds; 98,000 pounds; 14,500 pounds; 57 ½ tons on one vessel.

"This one vessel was confiscated with a street value in marijuana in excess of $25,000,000. In Fort Myers over the past few years there have been confiscated over 500,000 pounds of marijuana with a street value in excess of $225,000,000. The list goes on and on. I feel that if we take the appropriate action today that we will certainly reduce the amounts of drug smuggling into the State of Florida.

"All of you have on your desk a newspaper article which is in the Palm Beach Miami Herald section on Friday, March 3, 1979. The headline reads, "Police protests

release of guilty pot smuggler". This top smuggler was caught with 1400 pounds of marijuana; he is not serving one day in jail. The Judge says he is an outstanding family man and he did not want him to have a police record. We are seeing that the Courts are not acting as they should dealing with this problem. I think now we in the Legislature must come forward and do something to correct this problem.

"Senator yield?

"Yield.

"Senator, apparently you are trying to reach the problem of getting people with over 100 pounds of marijuana and a mandatory jail situation, is that correct?

"That's correct.

"I notice that the summary of the Bill, and this is what bothers me, sir, is likely that most offenders would plead guilty to a lesser offense during the plea bargaining so the proposed Legislation would have very little, if any, effect on the present population. Now, if that summary is correct what you are just saying is taking these cases out of the Court and putting them in the hands of the public defender and the Assistant Prosecutor and you are going to be sure that none of them are going to jail.

"Senator, there is going to be an Amendment offered on this Bill that will place the Governor's Bill on this Bill; I met with the Governor I met with Senator Pascola (phon.) on this yesterday afternoon and we all agree that this Bill, I think will go a long way in stopping the drug smuggling in the State of Florida.

"Will you yield to one more question, Senator?

"Yes, I would.

"Do you favor plea bargaining rather than Court actions in dealing with crimes; do you think that two guys ought to sit down and do it or do you think that a Judge or a jury ought to do it? I just wonder what your philosophy is on that. . . .

"In a broad sense, I'm against plea bargaining.

"You ought to be against this Bill, then.

"Mr. President.

"What purpose does the Senator pleads?

"To inquire regarding procedure to inquire of Senator Childers.

"I yield.

"Senator you haven't indicated year but you indicated to me earlier and I want to ask you, do you intend to offer a substitute Bill to this Bill that we've seen on our desks?

"(discussion about whether it was the one on the desks this morning - passed out to you in your office yesterday, Committee substitute for Senate Bill 620, which will be offered as an Amendment to this Bill.

"Well as I understand it, that Bill is substantially broader than the original Bill that dealt simply with the 100 possession of 100 pounds of marijuana; this one covers a broad gamut of drugs, and in the drug scheduling Statute, and I'm simply wondering whether or not there is a fiscal note on the Committee substitute.

"This has been Ways and Means.

"It has not gone to Ways and Means, it was heard in the Criminal Justice Committee, 6/20 was, if you look at the

Staff Report there is. . .

"That's the original Bill. . .

" 'Economic Impact and Fiscal Note'. . .

"That was the original Bill but has there been a fiscal note running on the substitute?

"The substitute is the Committee substitute.

"Mr. President, I'm just concerned about the procedure in the Senate; we are now beginning to move a little bit too fast; I'm concerned whether or not the Senate has had a chance to look at this measure in the depth that we ought to be looking at a Committee substitute.

"Mr. President, the Committee's substitute for Senate Bill 620 is identical to the amendment that is being offered to Senator Don Childer's Bill except for the change of one word from marijuana to cannabis; and that of course has no fiscal impact; so the fiscal impact of 620 is the same as the fiscal impact for this amendment to Sen. Childers' Bill.

"What purpose does the Sen. from the 35th arise?

"To state that if the same fiscal impact applies to the proposed Committee substitute as applies to the other, then the Department of Correction estimates the fiscal impact at about $15,000,000 over a number of years, and about $5,000,000 of prison construction and I'll go on and give you the whole analysis, Mr. President, but, ah, it's related incidentally to the point that Sen. Barron raised with Sen. Childers; the question is will they cite the Statute when they charge the people? If they cite the Statute it's going to have that fiscal impact; if the prosecutor doesn't cite the Statute, permits them to go to County jail or something like that it wil have no fiscal impact but it also will have no law enforcement impact

which is what the Bill is supposed to do. So that's the fiscal situation, I'm just waiting until that Amendment comes before us to actually raise the point, but I think that it is important for the Senate, to understand that that is the fiscal situation.

"Senator, I wonder if we could get in proper posture by just reading the Amendment, and then we can discuss the fiscal impact.

"Read the Amendment so. . .

"[Reading the Amendment] - by Senators Piccola and Steinberg [phonetics], strike everything after the enacting clause and insert a lengthy amendment.

"The ----- is recognized ----- to explaining that at the time to raise a point of order Senator that's after if the Amendment is adopted; there isn't the impact at that point.

"Mr. President, Senators, this Amendment is offered with the consent of Sen. Don Childers, and if you want to follow it I believe it's on your desk; I believe it is the same I indicated earlier as a Committee substitute for Senate Bill 620 and what the Bill does is expand what Sen. Childers original concept of dealing with 100 pounds or more of marijuana; this expands the Bill to dealing with other controlled substances such as cocaine, heroin, morphine, etc., and what it does is expand that concept of minimum mandatory sentences for a new crime which is defined, as three new crimes which are actually defined in the law; one if trafficking in cannabis, the second is trafficking in cocaine, and in the third it's trafficking in illegal drugs; it provides a range of penalties based on the quantity of the drugs and the range would be from three calendar years and a fine of $50,000.00 up to a maximum well in the case of heroin to a maximum of 25 calendar years and a fine of $500,000.00

"Now, why do we need this law? If you want to get in my opinion to the heart of the economic base of organized crime in Florida, Senators, you are going to have to get to the crime of drug trafficking and now under our present laws, there is really a void; we are at times arresting maybe the corporals, maybe the sargents but we never get to the majors, and the colonels, and never to the generals. The reason being for example somebody comes in with or is caught or the man is actually used because he can fly a plane or captain a ship and he has 100 pounds of marijuana and he comes in, he is caught, he might get sentenced to five years; he probably will be out in 18 months; one one load alone he could make from $300,000 to $500,000 of durgs or on 100 pounds of marijuana so the risks of getting caught and being in jail for a short period of time makes it worthwhile economically. Economically, all the law enforcement tells us that the very heart of organized crime is drug trafficking; the Miami Herald alone estimated that over five billion dollars a year in illegal drugs trafficking in Florida. We got the unfortunate reputation as a drug haven. Sixty Minutes not too long ago talked about Florida that way. The reason for the Bill is to make the penalty stiff enough that that guy that flies that plane in, that pilots that boat in, and when he hears that door slam and he know that he is going to be there for sure for 3 to 25 years, is going to make it worth his while to say who was financing the operation, where he got the money from; and I think it will contribute significantly to our drug problems, to solving our drug problem in Florida.

"We can't in Florida no longer tolerate the reputation of being a drug haven. I think that we should get this Bill passed; I hope it will be the first Bill enacted by the Florida Legislature and the word will go out throughout the world that we want to play hard ball in Florida with hard drugs so I urge you to adopt the Amendment.

"Senator from the 35th.

"Will the Senator yield for a question?

"Senator you are a former State Attorney and you have not lost your love for that particular office, so would, how would you know anybody who was arrested would necessarily be charged under the Statute?. . . .

"Since there are other Statutes under which people can be charged. . . .

"We do not know that they'd be charged under the Statute, but since law enforcement almost unanimously, in fact, I know of no one in law enforcement that does not support or want this vehicle; since they want it you must assume Senator that they plan to use it. . . .

"Well, couldn't you also make the assumption that since the majority or a significant number of jobs in law enforcement are there because people are going around chasing marijuana smugglers that the stronger you make the law the greater the opportunities for corruption, and the more jobs you need and the more promotions people get and everything else. Law enforcement is not necessarily just interested in enforcing the law; it's an institution like every other that may simply look for its own self-aggrandizement, don't you see that as a possible explanation for law enforcement support?

"But I don't accept that explanation, I'm sorry that you do. . . .

"Well, I think Senator that you have a flawed understanding of institutional behavior, but what I want to point out to you in a question of whether they'd be charged the Department of Correction says that two out of three people who could have been charged under the *Florida Statute* 775.087, the gun law, were not charged under the Statute, which is why a significant number of robberies, armed robberies are not getting the mandatory jail sentence, and I just want to know in law

enforcement was all in favor of that, and I want to know why law enforcement is . . . you're sure they are going to use this law and not other law so that this law is in fact an answer. . . .

"Well, you mentioned the earlier three year mandatory firearms law and you know I remember the fiscal note on that was something like $300,000,000.00 a year, and it is in fact costing us less to prosecute those kinds of armed robberies. . . .

"Well, what I'm telling you, Senator, is the reason is less is that two thirds of the people who could have been prosecuted under that law are being prosecuted under the lesser law and it's not being used by the prosecutors and it's not being used by law enforcement, and I'm asking you what makes you think that the drug law is going to be any different that the gun law?

"It gives them that option; the State Attorneys are for it; it would seem that if they are going to use it; there's much more support for this Bill than I remember being for the armed robbery Bill that was quite controversial and I'm sure that if they did use it, and they did catch a lieutenant, who did cooperate that we would for the first time get a general, that would make it worth its while. When you are talking about five billion dollars a year drug trafficking in this State, and that the few tools that we have to fight that, we go after-----financially in this State, you know, when they are making five billion dollars a year and what we could commit is a----to that, let's at least give them the legal tools or alternatives if you please for that. . . .

"Senator, are you aware of the, the story . . . I'm older than you and you may not remember this, but you are aware of the historical situation in 1932 when prosecutors were saying the same thing about whiskey, and liquor and people were bringing . . . the prices were lower in those days, so it was probably not a five billion

dollar business, but Florida was a great haven for liquor smugglers and the essential answer that came regardless of the sentence was that we made it legal and I don't know why you want to take the profits out of the situation, you don't take the analogy of Prohibition and apply it here since you are dealing primarily in marijuana with a drug that's no longer a Schedule 1 drug but is in fact a Schedule 3 drug.

"Senator, 1932 was way before my time but I also can recall or don't recall that there was a minimum mandatory sentences at that time for alcohol, illegal drug smuggling, nor was ah, any incentive at that time as provided in this Bill that if the man that was incarcerated cooperated that he would get some relief. . .

". . . Senator from the 35th . . .

"To ---- over again, and all those things were in the law, we had, all those, all those kind of business, it was the finest hour of the Coast Guard, that was the great expansion of the Coast Guard in this country, to hold off the smuggling by boat, we just didn't have airplanes, so we had somewhat different technological situation and I a practical matter we had the same situation and I think you really ought to examine, if you want to, if, if you really want to do away with the drug smuggling, and not just raise the price of the product, which is what you are going to do here, you are going to restrict the supply, raise the price, and all you doing in this Floor is raising the profit of the people in the drug business. . . I wonder why you don't look at the alternative, as a good economist and say, why don't we simply lower the price, take the corruption out and solve the problem that way,

". . . . . .on the desk. Read the Amendment.

"By Senator Thomas on page 3 of the Amendment line 21, strike the words, 'or Statutory gain time under Statute 944.275'.

"Mr. President, Members of the Senate, I hope that the sponsor of the Bill would accept the Amendment, it goes to the heart of discipline and control and management ------ statutory gain time does with the prison system; one of the things that I think I should caution you on and remind you of, some three or four years ago I think that it was Sen. Williams and others visited many of the prisons and created the Prison Industries Work Program. It's somewhat geared to statutory gain time and contract parole; if you take that away, you still got a very tough Bill and even under the best conditions of statutory gain time built up the penalties are beyond and more severe than what you have now; so, Senator, I hope that you would ... let's leave that in the Bill; that Amendment is acceptable.

"Any objection to that Amendment? Any objection?

"No objections; the Amendment is adopted. Are there Amendments?

"Any Amendments up, now? Are more?

"Any more debate on the Amendment? As amended? Any more debate? All those in favor of the Amendment vote "aye" (chorus of "ayes"); opposed? The Amendment is adopted.

"File the Amendment.

"----The Senator from the 35th has raised a point of order on this Amendment, and its precedence always do, Senator, they are very fine precedents going both ways. I think what we'll do until I get further notice will just temporarily pass this Bill and come back to it; I want to make sure when this one will ride; the, ah, we have had -------- and such scholars and knowledgeable people of the Rules whose longest term in office in the Legislature today, the Senator from the 3rd, and his famous ruling, and we have others going the other way; so, you wait and I'll try to get in a ruling in--Senator Barron, Senator Johnston and Senator Ware (phon.) will give you some advise on that, I'd appreciate it.

"We'll temporarily pass that Bill, ah, come back to it.

"Senator from the 28th.

"Will we come back to this Bill today?

"We'll try to.

"Thank you.

"Senator Barron moves we temporarily pass until... all those in favor, say "aye" (chorus of "ayes"); opposed (silence); read on the next Bill.

(BEGINNING OF BILL 16 - "An Act Relating to the Florida Highway Patrol Station in the City of Lakeland).
(E N D O F T A P E)

The Gainesville Sun April 7, 1979, 1-A, cl. 1

"Graham Signs Stiff Drug Bill Into Law"

TALLAHASSEE (AP) -- Gov. Bob Graham won his first legislative contest on Friday as the House unanimously approved his plan for cracking down on Florida's notorious drug business by imposing stiff sentences on traffickers.

Graham put his signature on the bill just two hours after the House voted 116-0 for a get-tough-on-drugs proposal (SB 83) that had sailed through the Senate the day before.

"If people want to be involved in the drug traffic, they'd better do it someplace else than Florida," Graham told reporters shortly after he signed the bill.

"This is a very visible action in our commitment to fight organized crime."

The measure became the first new law to result from the 1979 session which began on TUESDAY. It also was the first legislation signed by Graham since he became governor in January.

House Speaker Hyatt Brown told reporters at a news conference later in the day that Graham had appealed to legislative leaders to pass the bill quickly because of an "overriding need" to have it on the books before next week.

Brown refused to explain but hinted that the governor might have occasion to use the statute in the near future.

The new law hopes to cut down on the huge amounts of illegal drugs smuggled into the state from South America and Mexico by making it easier for law enforcement officials to win more conviction of drug-smuggling masterminds.

The law will establish a sliding scale of minimum mandatory prison sentence ranging from three years to 25 years for persons convicted of trafficking in large quantities of marijuana, cocaine or hard drugs such as heroin.

The only way such convicted felons could escape the mandatory sentence would be to turn state's evidence -- cooperate with law enforcement officials trying to indict higher-ups in the drug-smuggling world.

Supporters have said they hope the opportunity to escape from the mandatory sentence will convince some convicted drug smugglers to turn state's evidence on their underworld bosses.

Supporters also have said the law will help to counteract the embarrassing national publicity Florida has received about its estimated $5-billion-a-year drug-trafficking industry.

"Today we have an opportunity to drop a bombshell in the minds of the drug-smuggling business in Florida and the United States," said House Criminal Justice Chairman Robert Crawford, D-Winter Haven.

"We're sending out a pretty strong word to drug traffickers that if you get caught involved in it, we're going to get to you."

The Gainesville Sun, 19 October 1979

GRAHAM SAYS GET-TOUGH DRUG LAW IS WORKING

SARASOTA (AP) — Gov. Bob Graham said Thursday that Florida's new get-tough drug law, tossed out by five judges but upheld by four other, already is helping the state rid itself of big-time drug traffickers.

"We're in for a long, tough fight to rid our state of drug traffickers, but we've already made some inroads," Graham said in remarks prepared for a speech to the Florida State Attorneys Association. "We're beginning to see results already from our minimum mandatory sentencing law."

However, Graham didn't say what those results were. He only said that some Georgia officials had expressed an interest in the controversial measure because drug smugglers "apparently are fleeing Florida" and moving into other states.

In Tallahassee, the governor's staff said the only indication they had about the law's effects was the assertion by some Georgia and federal officials that the smugglers are setting up shop in other states. They acknowledged no statistical data have been compiled yet on how the controversial new law is working.

"It's premature for that to be available because the cases have to move through the courts," said Graham aide Jill Chamberlin.

Graham was the chief proponent of the new law, which was rushed through the Legislature in two days last session after the CBS-TV program "60 Minutes" ran a 15-minute segment highlighting Florida's status as the nation's major entryway for drug smugglers.

The law requires three-to 25-year prison sentences for drug traffickers who are caught with more than 100 pounds of marijuana or 28 grams of cocaine. Prosecutors may arrange for defendants to get lighter sentences if they help the state get other smugglers.

The measure has been declared invalid by five trial

judges in Dade and Broward counties but has been upheld by four others. It now goes directly to the Florida Supreme Court for a ruling on its validity.

"We expected to meet a constitutional challenge of this nature and we welcome the opportunity to vindicate the principles of the law in the Florida Supreme Court."

THEIR LEGACY: AIR-SEA DRUG SMUGGLING NETWORK

The Miami Herald, April 16-20, 1978

Third of a Series

By WILLIAM R. AMLONG
Herald Staff Writer

The legacy of Kenneth G. Burnstine, war pilot, and Harold Derber, sea captain, is the multibillion dollar drug smuggling industry as South Florida knows it today.

They built that industry with the flair of pirates, the cool detachment of board chairmen.

Both died violently: the mysterious Derber in a midnight assassination, the flamboyant Burnstine in the crash of his favorite stunt plane.

EVEN AFTER death, the two still loom large, not simply legends but as economic forces. Their smuggling networks operate without them. Burnstine's lieutenants learned about shuttling planeload after planeload of marijuana; Derber's former associates continue using the mother-ship concept he popularized. Multimillion dollar court fights involving heirs and the Internal Revenue Service continue.

Burnstine, a stock broker and real-estate developer before becoming a smuggler, pressed into service virtually the entire flying stock of his small airline to shuttle marijuana from Jamaica. His smuggling operations were characterized by the same kind of hell-for-leather flying techniques he used flying Korean combat missions as a Marine Corps pilot.

ONE BURNSTINE technique had two planes fly so

close together that they appeared to be only one on the radar screen: after both buzzed low over a cow pasture, one would land for unloading as the other would soar off as a decoy. Burnstine liked to call himself "the best pilot in the world." He crashed his vintage P51 fighter, Suzie Q, June 17, 1976.

Smuggling gave Burnstine both an excitement and a status that one investigator said Burnstine told him he never enjoyed as a conventional businessman: "His original reason for getting into the dope business was the intrigue. He said it got his adrenalin going. Apparently he was accepted by the community because he was a smuggler. He claimed he went to the best parties in town and rubbed elbows with the best people and they treated him good — better than they treated him as a businessman."

Derber, a dapper form officer of Her Majesty's Royal Navy, perfected the mother-ship concept — huge, rusting freighters steaming north from Colombia with megaton loads of Colombian marijuana. The ships would rendezvous on the high seas with smaller, faster craft for the run to shore.

TEN MONTHS after Derber's slaying — still unsolved, probably unsolvable — a fitting epitaph was assured when federal officials made the largest-ever shipboard marijuana seizure: 54 tons aboard the MV Night Train, a 110-foot freighter that Derber bought in November 1974 and which his associates saw no reason to mothball after his death.

Derber was one of the more mysterious characters even in the shadow world of international drug smuggling. He was deported in the early 1960's after collecting more than 1,100 advance fares of $23 to $50 from refugees whose relatives he proposed to ferry here from Cuba — but making only one trip with 13 refugees aboard. Somehow, however, he was permitted to enter the United States in 1974 "for business purposes" and promptly went into the smuggling business with former Hallandale Mayor John David Steele.

Before Derber's death, the Drug Enforcement

Administration showed little apparent interest in his finances, and after his death little interest in his slaying, complain investigators from other agencies. "we really didn't have much of a file on him," said Frederick A. Rody, acting regional administrator of the DEA.

The deaths of both Derber and Burnstine came at crucial times during investigations of their smuggling activities and associates. Derber was under subpoena to appear the next day before Securities and Exchange Commission investigators concerning his investment in practices. Burnstine was to be the chief witness in two major cases — a federal drug conspiracy charge against Mitchell Werbell III, an arms dealer with strong connections to the U.S. intelligence community and for a state fraud charge against Randy Avon, then a state representative from Fort Lauderdale. Werbell was subsequently acquitted; the charges against Avon were dropped.

THERE IS dispute among investigators who knew Burnstine about how much money he made in the marijuana business. The lowest estimate is that he grossed something more than $5 million during 1972 and 1973: that is based on statements to DEA that he brought in 10 planeloads, averaging 3,000 pounds each, and sold the marijuana for $180 a pound. Higher estimates are $10 million a month, also based on statements by Burnstine.

Some persons close to Burnstine characterized his post-conviction confessions as braggadocio. "He lived in a dream world and he lived pretty well," said one person intimately familiar with Burnstine. "But I doubt that he had one-fiftieth of the money that the government thinks he made. He got in so much trouble telling agents things. He just liked to startle people with large figures. He just built up an aura and he enjoyed that aura. He liked to perpetuate the myth."

Burnstine relished his swashbuckling image. He maintained it to a point bordering on indiscretion: while concealing the ownership of his palatial Fort Lauderdale

home by putting it in the name of a foreign corporation, 2101 Middle River Drive Ltd., for example, he drew attention to it by keeping a lion on the grounds. He spent money lavishly, charging on one visit to a jewelery store a $650 belt buckle, a $269 money clip and a $235 key ring.

BUT BURNSTINE, for all his flamboyance, was still businesslike and conscious of security. "Burnstine didn't use the telephone very much," recalled a source who knew him well. "He went out and used paybooths."

Burnstine's lawyer was Burton R. Levey, a Miami attorney who petitioned to be named adminstrator of the estate because he "was the attorney for the decedent and is the only one who has knowledge as to the complex matters of the decedent."

During a telephone interview, Levey, a specialist in corporate and real estate law, said he had known Burnstine since Burnstine's days as a developer in Fort Lauderdale. "That was my association with him," he said. Asked if he knew Burnstine was in the marijuana smuggling business, Levey replied: "I'm not saying he was even in it."

Burnstine was in it, without any doubt. And he was planning to grow, expanding into the cocaine trade. "When we convicted him," said an agent for the Drug Enforcement Administration, "he was setting up an operation to bring in up to 80 kilos (about 175 pounds) of coke a month. I think he was going to build up to that. In the beginning, he was starting at 10 kilos. He wanted to know if we (undercover agents posing as cocaine manufacturers) could supply that amount."

BURNSTINE became an eager informant after his federal court conviction. His value as an informant was limited by his penchant for dealing with as few persons as possible. Said one investigator, frustrated by Burnstine's resulting inability to name everyone connected with his operations: "Burnstine was like the president of a corporation and he only dealt with other president. He only dealt with his top staff."

Harold Keats, a prominent Fort Lauderdale

businessman who Burnstine attempted to link to his smuggling operations, complained to a reporter: "...In his efforts to get out of his problem, to try to keep from going to prison, he was giving them all kinds of information whether it was correct or not."

Keats, although he said he remembers little about the investment, was among those listed on the SEC registration statement as an investor when Burnstine sought to go public with his small airline and taxi service. Florida Airways Internation (FLAIR). Although FLAIR never made it big as an airline, its cargo runs from Jamaica were worth millions.

THE AIRLINE is one of three companies which, together with Burnstine's individual estate, are the joint targets of IRS liens for $2,590,122.70 in unpaid taxes. During 1973 alone, IRS documents allege, Burnstine and the three companies had an income of more than $2 million. One, Internation Finance and Development Corp., had bank deposits of $832,833.11 and a $110,026.84 land purchase during 1973 — without ever filing an income tax return.

For all the flourish and for all the grand plans, however, there are some indication Burnstine may have died broke. "Toward the end," said a source who knew Burnstine well, "he was borrowing from people who had gone to their bank accounts and taken out their life savings to loan them." Some investigators, however, dispute that, saying that Burnstine had money — but had it where no one could find it.

So maybe Kenny Burnstine did die broke. Anything's possible. Harold Derber did not. That is certain.

There is some question, though, about just how rich Derber was — an unanswerable question until all the lawsuits are over and someone can present himself to the Panama branch of the **Banque Nationale de Paris** with legal right to the millions in marijuana profits Derber deposited in the account of Ocean Explorations corp. At stake, estimates one lawyer familiar with the case, is $12 million.

EVEN MORE intriguing questions, however — ones

which will now likely never be answered — were those asked by the SEC and the Brooklyn, N.Y., office of the Justice Department's Organized Crime Strike Force about the hundreds of thousands of dollars Derber was investing in stocks.

"When they found out the Derber was in marijuana, they figured that possibly there were organized crime connections," said a source familiar with the investigation. "There was suspicions that there was something big and suspicious going on."

Since drug money was thought to be involved, the source said, the DEA was notified — and New York investigators questioned the drug agency's apparent inactivity. "DEA kept diddling around and diddling around and diddling around," the source said. "And the next thing anybody knew, Derber was dead."

He was killed the day before he was supposed to answer an SEC subpoena.

The investigation of Derber's slaying also raised questions — especially in the mind of Jim Carpenter, a city of Miami homicide detective who retired earlier this year with the Derber case still open, still unsolved. Although DEA officials say the agency cooperated fully with Carpenter, he pointedly disputes it.

"**WHEN I FIRST** started talking to them," says Carpenter, "they denied having any file on Derber . . . .

"They finally acknowledged who he was. They said they had done some checking and found a few things out. They said maybe he was a Russian agent. They said maybe he had been a spy in World War II and somebody killed him because of that. They finally acknowledged to me that he was moving many, many tons of grass. This was later. They came up with the names I had already found out saying, 'Yeah, you're right.' "

They Southeast Regional Office of the DEA refused to permit a reporter to interview, under any circumstances, any of the agents who had investigated Derber. Officials said that many of active investigations — an issue not raised in the Burnstine case where the same argument could be made.

The Herald was able to obtain access to and examine many Derber's bank account records. They are staggering. During the last 18 months or so of his life, Harold Derber bought more than $2.5 million in certificates of deposit, transferred $371,000 from U.S. banks to his personal account in Panama and made cash deposits ($130,000 once, as an example) which kept tellers counting for hours.

IN 1975, he loaned $300,000 — through one of the companies he used to launder marijuana profits — to Leather-Orr, a handbag sales firm in which Ray Adiel, an old friend, had an interest. In November 1974, Derber had purchased from the First Israel Bank in New York City a $235,000 certificate of deposit on which was the notation "for Leather-Orr."

In 1977, when the company sought to go public under the name Empire-Orr, it was revealed in SEC documents that the $300,000 loan had been converted into stock in the company after Derber's death. The rest of the stock in the company is owned by ASA, Inc., a corporation that is wholly owned by a New York man but is headquartered in the Miami law offices of Sidney Syna, according to the SEC papers.

Syna is an attorney who represented Derber at one point and who represented Derber's British relatives in successfully challenging the claim of 32-year-old Sandra Lake that she had married Derber in a Colombian ceremony. Lake described Syna in a deposition as being among Derber's close friends. Syna declined, on the basis of attorney-client privilege, to discuss the conversion of the $300,000 loan to stock. The owner of ASA, according to the SEC papers, is a former Miami stock broker named W. Lee Clark. When telephoned, he said, "I have no comment," and hung up the phone.

THE $300,000 loan was made by Ocean Exploration Corp., a firm who ownership is in dispute. Derber was the only person with check-signing authority on the firm's accounts: but Lake, the adjudged non-widow, has all the stock certificates — bearer stock that says whoever holds the paper owns the stock. Derber's

British relatives are suing her. They were being represented by Syna.

Some other of Derber's transactions are especially curious. Between Feb. 4 and June 14, 1974, for example, Derber deposited $502,500 — $106,250 of it in cash — into the account of an otherwise unidentified R. C. Gomez; four of the deposit slips, among Derber's papers when he died, all had "Porta" or "Porter" written on them and one dated May 29 contained the notation, "Copy to Mr. Porter and copy sent to the customer." Nothing more could be learned about Gomez — if, indeed, that was his real name. The account is now closed.

In another transaction, on Sept. 21 1975, Derber wrote three consecutively number checks for $20,000 each to somebody named Jairo Diaz: the checks were endorsed in three different handwriting styles and deposited in three separate accounts.

DERBER ALSO invested his money in stocks, generally through First Jersey Securities, a New York brokerage firm whose president, Robert E. Brennan, remembers Derber as being "a larger client" and presenting a reserved facade. "The aspect I saw of him was more of a subdued, quite, gentle-type guy and what happened was quite a shock," said Brennan.

In late 1975, Derber bought from Brennan for $10,000, 5 per cent, or 50,000 shares of Chef's Internation Inc., the chain that owns a string of La Crepe Restaurants (there's one in the Dadeland Mall). The company was seeking to go public in 1976 with the stock selling at $4 a share. Although immediate sale of such charter stock is restricted by the SEC, the on-paper worth of Derber's investment would have increased to $200,000 as soon as the company went public.

At no time during their dealings, said Brennan, did he realize that Derber was in the marijuana business. "Man I would say he that was at least equal to the shock of the way he died."

DERBER'S SMUGGLING activities were "something that nobody knew," said Wallace Pawley, a socialite

National Airlines pilot who with another flyer had invested in a Panamanian shipping corporation controlled by Derber. Pawley described Derber as "quiet" and "a nice guy when I knew him." He said his dealings with Derber were "always above board." Pawley declined, however, to say how he met Derber: "That's my business."

One person who remembers Derber fondly is Ted Akey, a Florida Marine Patrol sergeant who was formerly a narcotics investigator for that agency. He participated in the arrest of Derber, Steele and a third man in September 1974 at a South Dade location where 3,000 pounds of marijuana were found (the case was thrown out because of an improper search).

Akey said he even gave Derber his Marine Patrol business card, with his home phone printed on it, as an undercover ploy. "I was gettting close to working a deal with him where I'd ben on one of his boats," Akey said. "i was getting close to him. . . We were sitting there having coffee one day and he asked me how much I made a year, and I told him about $10,000. He said something about 10 times that. I said I'd think about it."

Akey remembers Derber as "very reserved." Derber he said, was "a good fellow. He had his thing.

"He was the kind of guy you'd make a movie about. He'd be the Erroll Flynn."

ORTIZ, et. al. v. STATE (Case no. 80-15)
TRANSCRIPT OF
MOTION FOR SEVERANCE
AND SENTENCING PROCEEDINGS,
before R. A. Green, Jr.
Circuit Judge,
8th Judicial Circuit
In Bradford County,
Florida
August 11, 1980

THE COURT.....

...The purpose of the trafficking statute and the pecuniary gain and sentencing statute, I feel, is to make an occupation quite costly. The purpose of the mandatory minimum sentence is to protect the people of the State of Florida in two things: One, what some would call unnecessarily lenient parole procedures by the Parole and Probation Commission; and from what would be criticized by some as being unnecessarily lenient trial judges in seeking to deal with crowded dockets on disposed of cases, on plea bargains, through the methodology of withholding adjudication of guilt and imposing a probationary period as a sentence.

The offenses that the three have pled nolo contendere to, that of cannabis and possession or importation is, first of all, a first degree felony. A first degree felony under the State of Florida carries a maximum sentence of thirty years at Florida State Prison. A first degree felony also carries a potential fine of some fifteen thousand dollars. And in order to structure the discretion of the trial courts and of the Parole Commission, the legislature, in its wisdom, benign or otherwise, has stated that if the quantity of the contraband exceeds a certain amount, discretion shall not be exercised to grant parole for either a period of three years, if the amount involved of the cannabis is in excess of one hundred pounds, but less than two thousand pounds; or not less than five calendar years, if the amount of cannabis is more than two thousand pounds or less than ten thousand pounds.

The trafficking statute also provides that the amount of the fine can be, rather than fifteen thousand dollars, twenty-five thousand or fifty thousand, respectively.

Chapter 775 provides in the definitions of pctential fines that a person may be fined in an amount of double the pecuniary gain of that person for committing the offense; or double the amount of the loss of the victim. Where does that leave us here?

As it relates to the possession and delivery and importation of cannabis, I think reason and common sense supports the conclusion that the three of you were involved together.

* * *

In the area of drug importation, pecuniary gain must be anticipated pecuniary gain, or else the pecuniary gain doubling of the statute would be an unenforceable statute. Each may be charged, I believe, with the total amount of the potential pecuniary gain of the joint enterprise.

So, it would appear that Mr. Ortiz, Mr. Suders and Mr. Comparato each potentially had the same pecuniary gain, as partners in an enterprise; and all are subject to the gain, as must be all subject to the potential losses from the deal.

Accordingly, Angelo Ortiz, Roger John Suders, and Salvatore Comparato, having found each of you guilty of trafficking in cannabis, contrary to the Florida Statutes, it is the Order, Judgment and Sentence of the Court that each of you be delivered to the proper official of the Department of Corrections, there to serve the full term and period of thirty years.

In addition, you shall pay a fine computed at the rate of five hundred seven dollars per pound times twenty-one hundred thirty-two pounds, which represents by computation the deduction for the wrapping, for a total amount doubled the pecuniary gain of two million one hundred eighty-one thousand dollars eight hundred forty-eight -- two million one hundred eighty-one thousand eight hundred forty-eight dollars.

Graham v. Vann,
394 So.2nd 180
(Fla. IDCA 1981)

Bob GRAHAM, individually and in his official capacity as Governor of the State of Florida; and Louie L. Wainwright, individually and in his official capacity as Secretary of Florida Department of Corrections, Appellants,

v.

James VANN, Larry Anderson, Harry Mungin, Charles Green, Willie Middleton, James Sparks, William Hill, Phillip Elliott and Floyd Price, Appellees.

No. XX-474

District Court of Appeal of Florida,
First District.

Feb. 13, 1981

Jim Smith, Atty. Gen., Kent A. Zaiser, Asst. Atty. Gen., Tallahassee, for appellants.

Alan R. Parlapiano, Public Defender, Jack J. Fine, Asst. Public Defender, Gainesville, for appellees.

PER CURIAM.

This cause is before us on an interlocutory appeal from a peremptory writ of mandamus. The appellees are inmates at Florida State Prison at Starke, Florida, who contend that they have been, and are being, denied certain fundamental constitutional rights as the result of inadequate security measures, inadequate staff training, insufficient number of staff members, over-crowded conditions and physical plant deficiencies.

On May 29, 1980, the inmates petitioned for a writ of habeas corpus. The trial court issued an order directing the appellants to appear and show cause why the writ should not be issued and an evidentiary hearing should not be held. The appellants appeared at a June 5, 1980 hearing at which time they filed a motion to dismiss and/or response to petition for writ of habeas corpus. The hearing resulted in a denial of their motion and a finding that habeas corpus was not a viable remedy. The court found, however, that probable cause existed for the issuance of a peremptory writ of mandamus and entered an order directing the appellants to show cause why such a writ should not issue. On August 20, 1980, the appellants appeared before the court, but declined to present any direct evidence or testimony in response to the show cause order. The judge appointed an Advisory Commission to explore, investigate, define, evaluate, and recommend alternative approaches to the problem. On October 3, 1980, the appellants filed their response to the report of the Advisory Commission. The judge found the response inadequate and ordered the appellants to reduce the inmate population to not more than 750 prisoners on or before 10 days from the order; to file within 11 days of the order report in which the names, offenses, Department of Corrections numbers and new locations of the transferred inmates were listed; to submit a plan for implementation of the recommendations of the Advisory Commission to the court within 30 days, and to seek accreditation of the prison by the American Corrections Association.

In their appeal from the order, the appellants present the following four points for our consideration: whether there is competent substantial evidence to support a finding that the constitutional rights of the appellants are being denied by the appellants; whether the trial court erred in treating this cause as a class action; whether the trial court erred in granting relief by way of mandamus; and whether the trial court erred in granting the relief ordered without considering the possibility and effect of compliance.

The record overwhelmingly supports the finding that an emergency situation continues to exist at Florida State Prison resulting in a denial of the appellees' constitutional rights, necessitating the need for corrective action.

The appellants apparently concede that the original petition seeks relief for the appellees only and is inoffensive. They argue, however, that the metamorphosis to class action results from the judge's order requiring prison inmate reduction. We disagree. Reduction of the prison population would appear to be one viable remedy available to the judge to correct an unconstitutional situation that the Department of Corrections appears to be unable or unwilling to redress. The following except from the record sheds light on the frustrations encountered by the judge and convinces us that there is no merit to the assertion that the court is insensitive to the possibility and effects of compliance with its order and has overreacted:

> I don't believe there are many within the sound of my voice that would disagree with the generat statement that the Department has returned, but the balance of the response to that goes on.
>
> "The suggestion that staff be transferred to Florida State Prison from other facilities is not a realistic solution. The solution which underwrites mandatory transfer of experienced staff to Florida State Prison would ignore current literature and experience in the management area."
>
> The response of the Department is in the court file and it is a multi-paragraph response to each of the findings, short-term and long-term recommendations. Essentially, some are agreed to with the "imminent change of certain conditions." Others are referred to as being up to the Legislature and beyond the Department's control.
>
> The Department has indicated they will seek additional twenty-two, I believe, Correctional Officer II slots, some of which, I assume, would be lateral transfers of Correctional Officers I presently

and others might be new.

The bottom line of this response is-appears to me to be business as usual by the State of Florida.

On the Clerk's desk in fron of me are two rather large stacks of documents. Those are copies of the incident reports of violence withing the past two years at Florida State Prison at Starke. The homicide rate at Florida State Prison at Starke has approached one death every other month since the first of the year. Indeed, if memory serves, there was a murder there on Monday after the advisory commission reported. The stabbing incidents there continue and I give the staff at the Florida State Prison at Starke credit for doing everything they are able to do to deal with the problem. The staff of Florida State Prison at Starke, for reasons set out in the commission report and others, I think are simply unable to deal with the problem as it must be dealt with.

I have great confidence in the report of the commission. The vitae attached to the report indicate that this commission is one of persons with qualifications in the corrections area that should know what they're talking about. In essence that commission said these are the things wrong and this is what is needed to correct it and they said if we can't do these things to correct it, then an immediate reduction in population is the alternative.

Now, the Department says four hundred or four hundred and fifty people moved from the Florida State Prison would exacerbate the problems elsewhere. No doubt that's true.

In addition, I am advised that the Legislature will be in special session in the next month and I presume it's within the purview of the Respondents in this cause to make such requests of the Florida Legislature to deal with the problem that Respondents feel is consistent with the needs shown.

The people have paid or will be paying roughly sixteen thousand four hundred and six dollars for the report of the special advisory commission, consultants' fees, costs of transcripts, court reporter fees and transcripts. That is entirely too much to spend not to heed recommendations made by that commission.

Accordingly, this Court finds that the violent conditions previously found to exist at Florida State Prison at Starke continue to exist. This Court finds the response of the Respondents filed in this cause inadequate. In order to deal with the continued loss of life at the Florida State Prison together with the continuing assaults on prisoners and custodial officers by inmates, does find that an emergency continues to exist.

In their challenge to the peremptory writ of mandamus the appellants correctly point out that mandamus is an extraordinary remedy based on equitable principles which will issue only upon a showing of a clear legal right in the petitioners to the performance of a legal duty or ministerial act. The writ cannot be used to compel a public agency clothed with discretion to exercise that discretion in a given manner. *Evans v. St. Regis Paper Co.*, 287 So.2d 296 (Fla.1974); *Hunter v. Solomon*, 75 So.2d 803 (Fla.1954). It is argued that the appellees have not demonstrated that they are entitled to any legal right which the appellants are denying them. In light of the judge's findings, which we have determined are supported by the record, this position is untenable. Louie L. Wainwright as Secretary of the Department of Corrections is charged with supervising and directing the promulgation of Department rules that effectuate the legislative purpose. That purpose is spelled out in the Florida Statutes (1979) as follows:

20.135 Department of Corrections. - There is created a Department of Corrections.

(1) PURPOSE. - The purpose of the Department of Corrections is to integrate the delivery of all offender rehabilitation and incarceration services

that are deemed necessary for the rehabilitation of offenders and protection of society. The goals of the department shall be:

(a) To protect society by providing incarceration as an appropriate deterrent to the commission of crime.

(b) To protect society by substituting for retributive punishment methods of training and treatment which correct and rehabilitate offenders who violate laws.

(c) To provide an environment for incarcerated persons in which rehabilitation is possible. This should include the protection of the offender from victimization within the institution and the development of a system of due process and internal legality in institutions.

(d) To provide meaningful community supervision for offenders on parole and probation and to develop community alternatives to traditional incarceration which could be safely used.

(e) To provide rehabilitative programs, which may include both academic and vocational education, to incarcerated offenders and offenders being supervised in the community.

(f) To provide judges with effective evaluative tools and information for use in the sentencing decision.

(g) To provide the necessary level of security in institutions.

the appellees have a clear legal right to be confined in an institution where they are free from victimization by other inmates. The Department of Corrections has an equally clear legal duty to provide the appellees with such incarceration. Mandamus will issue to compel the performance of that duty. *Moore v. Florida Parole & Probation Commission*, 289 So.2d 719 (Fla.1974); *Battis v. Florida Parole & Probation Commission*, 386 So.2d 295 (Fla. 1st DCA 1980). We do not view the trial order as an attempt to direct the appellants to exercise

discretion in a circumscribed manner, but rather an attempt to compel the Department of Corrections to comply with constitutional requirements.

The order is accordingly affirmed.

SHIVERS, SHAW and THOMPSON, JJ., Concur.

IN THE CIRCUIT COURT OF THE
EIGHT JUDICIAL CIRCUIT, IN
AND FOR BRADFORD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CHARLES J. DANIEL,
T. C. GREEN, JR.,
DANIEL M. ALCANTARO,
JOSEPH D. COZZI and
RICHARD LEE WILLIAMS,

Defendants.

STATE OF FLORIDA,

Plaintiff,

vs.

KENNETH W. DAVIS and
TONY D. ELMORE,

Defendants.

STATE OF FLORIDA,

vs.

RONNIE LEE POUNCY,
ROBERT DAVID ROY and

SCOTT DANIEL PHIPPS,

Defendants.

STATE OF FLORIDA,

Plaintiff,

vs.

MALCOLM SCARBROUGH,

Defendant.

Case No. 80-259-CF Case No. 80-291-CF Case No. Case No. 80-259-CF Case No. 80-291-CF

Case No. 80-335-CF Case No. 80-386-CF

ORDER ON MOTIONS TO DISMISS

The defendants seek dismissal, as a matter of law, of escape charges made against them while inmates at Florida State Prison, which charges allege the inmates were "lawfully" confined and that the "escape(s)" occurred on specified dates from May 29, 1980 through September 27, 1980.

Defendants correctly argue that this Court found conditions at Florida State Prison violative of constitutional provisions in *Vann v. Wainwright* (80-230-CA). (In *Vann*, the prima facia finding of unconstitutional conditions was made by issuance of a Show Cause Order on May 29, 1980 and found to continue to exist in the Order of October 3, 1980. These findings have been upheld by decision of the First District Court of Appeals of February 13, 1980 [copy attached] and the Mandate to this Court is expected

March 16, 1981.) The defendants' rationale is that the specific constitutional violation found in *Vann* was that conditions at Florida State Prison were so violent that same constituted cruel and unusual punishment. Cruel and unusual punishments are expressly prohibited to the states by the 8th Amendment to the United States Constitution and further prohibited in Florida by Article 1, Section 17 of the Constitution of the State of Florida.

These defendants are within the specific class of citizens protected by those provisions of the Constitutions; on the charge date they were suffering the very State action that the Constitutions prohibits since the State alleges they *were* incarcerated at Florida State Prison by the informations filed herein.

By any reasonable interpretation, to find a State action unconstitutional is the same as finding that action beyond the power of the State to take; an *ultra vires* action is, by definition, an illegal action. Hence, an unconstitutional State action is an unlawful and illegal action. (In this context, term action includes affirmative actions and inaction or neglect which cause prohibited conditions to exist.)

So then, in the instant cases, the State has charged that the defendants "left" lawful confinement, for which the State seeks the sanction of an adjudication of guilt and the imposition of *additional', as opposed to continued incarceration.*

May the state allege lawful confinement in these cases?--surely; can the State prove it as a matter of law?--just as surely not.

These defendants have not petitioned for release from their present confinement at Florida State Prison--which this Court would be without authority to direct since they were committed by Courts of equal jurisdiction of this Court; nor have they moved to dismiss based on unsupported allegations on unconstitutional conditions.

Because of the unusual nature of this and the *Vann* ruling, this Order shall apply only to the instant cases which allege escapes between May 29, 1980 and October

2, 1980; shall not be retrospective in application; shall not apply to any case in which the issue was not raised prior to plea or adjudication; nor shall this Order be considered as precedent by this Court in any category of case except the foregoing.

This Order is entered effective at 5:00 p.m., March 16, 1981 and conditioned upon the issuance of the Mandate in *Vann v. Wainwright* as implementing the opinion of the First District Court of Appeals issued February 13, 1981.

DONE AND ORDERED this 10th day of March, 1981 in Chambers at Starke, Bradford County, Florida.

/S/ R. A. Green, Jr.
R. A. GREEN, JR.
CIRCUIT JUDGE

Copies Furnished to:

John Stinson, Esquire
Shon A. Saxon, Esquire
Mack Futch, Esquire
State Attorney

corr:

THE GAINESVILLE SUN, October 10, 1981,
Page 1C, cl. 2

GRAHAM ATTACKS LACK OF AID IN DRUG FIGHT

FORT LAUDERDALE (AP) — Two top Florida officials blasted what they called Washington's indifference to the state's drug problem Friday, telling a Congressional panel that nothing short of a huge federal effort could halt the tidal wave of illegal drugs washing over the state.

Gov. Bob Graham headed a parade of state officials who told the U.S. House Select Committee on Narcotics Abuse and Control here that Florida authorities, acting alone, were powerless to halt the drug smugglers.

Graham told the committee that in 1978, the U.S. General Accounting Office estimated the illegal drug trade in South Florida at $7 billion. Graham said drug traffickers have increased their activities in the last two years.

Such a huge flow of illegal drugs has turned South Florida into the nation's "main drug war battleground," Graham told the panel chaired by U.S. Rep Leo Zeferetti, D-N.Y.

Graham charged the Reagan administration with paying only lip service to the fight against the importation of marijuana, cocaine and other illegal drugs.

"Although final congressional action has not been taken, a review of the latest requests from President Reagan shows that he seems bent on reducing the budgets of the main federal agencies fighting drug crimes," Graham said.

Budget cuts totaling $584.6 million proposed by Reagan for the FBI, the Drug Enforcement Administration, federal prosecutors, the Internal Revenue Service and the U.S. Coast Guard, would leave Florida ill-equipped to deal with "the gigantic foe," Graham said.

He said it would be impossible to win the cooperation of the Columbian government in the drug war without a firm financial committment from the Reagan administration. Graham called Colombian support essential since many of the drugs secreted into Florida

come from Colombia.

Graham defended his record on enforcing the state's drug laws, citing the addition of 802 positions in state attorneys' office, an increase of 67 agents in the Florida Department of Law Enforcement and the addition of 108 troopers to the Florida Highway Patrol since he took office in 1978.

Legal measures—including minimum mandatory sentences for drug traffickers—have also been adopted, Graham said.

But Graham said direct federal action and heightened coordination between federal and state law enforcement agencies was necessary.

"Only when the federal government decides to join vigorously in the fight do we stand a chance at all of winning" the drug war, the governor said.

Graham and Florida Attorney General Jim Smith asked the lawmakers to push for repeal of the Percy Amendment to help foreign countries spray herbicides on marijuana crops.

Spraying, Smith said, "is analogous to destroying the enemy's ammunition. It makes a lot more sense to do it at the factory than to wait until it reaches the front line troops."

Spraying in Mexico had once cut marijuana imports to the U.S. from that country by 80 percent, Smith said.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-960

IN THE

Supreme Court of the United States

October Term, 1981

RONALD C. LOCKE and LESLIE L. FLAGE,
Appellants,

v.

STATE OF FLORIDA,
Appellee,

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

APPELLEE'S MOTION TO AFFIRM

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128
(305) 377-5441

Attorneys for the Appellee

QUESTION PRESENTED

Whether Section 893.135, Florida Statutes is unconstitutional in that it is violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and cruel and unusual punishment.

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PREFACE

The Appellants were the defendants in the Florida trial court below. The State of Florida was the prosecution below. In this brief, the parties will be referred to as they appeared in the trial court below.

The following references are made in this brief:

(A) For the Appendix to the brief of the Appellants, consisting of pages A1 to A323.

I

OPINIONS BELOW

The several opinions of the Florida Supreme Court reversing the florida trial Courts' findings that Section 893.135 Florida Statutes is unconstitutional are reported at State v. Benitez, 395 So.2d 514 (Fla. 1981); State v. Yu, 400 So.2d 762 (Fla. 1981); State v. Werner, 402 So. 2d 386 (Fla. 1981); State v. Newman, 405 So.2d 971 (Fla. 1981); State v. Thebeau, 405 So.2d 971 (Fla. 1981). The Florida First District Court of Appeal may have affirmed the present Defendants' convictions and sentences based upon one or more of the foregoing opinions. The Florida District Court's opinion herein is reported at Locke v. State, 402 So.2d 618 (Fla. 1st DCA 1981). See, also, Al. There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendants claim jurisdiction herin based upon 28 U.S.C. 1257(2). The present decision is final within the meaning of this court's jurisdictional requirements. See, Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Nash v. Florida Industrial Commission, 389 U.S. 235, 237 at n1 (1967).

III

ARGUMENT

The State is in receipt of the Defendants' jurisdictional statements on appeal from the District Court of Appeal of Florida for the First District, in which the District Court affirmed the Defendants' judgment and conviction for attempted trafficking in marijuana, for an amount in excess of one hundred (100) pounds. See, A106a-A106n. The Defendants now seek a second review in this Court. The Defendants claim that the mandatory penalties under Section 893.135 (1) and the provision for mitigation in Section 893.135(3) in the event of a defendant's "substantial assistance" are violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and crue and unusual punishment.

A. THE PRESENT CLAIMS ARE MOOT.

The Defendants have not been convicted of trafficking under Section 893.135 Florida Statutes, but rather have only been convicted of attempted trafficking. See, A106i-A106n. The Defendants are thus not subject to the procedures and mandatory penalties under Section 893.135 about which the Defendants presently complain. See, §777.04 Fla.Stat.

In the Florida District Court of Appeal, the State only relied upon State v. Benitez, 395 So.2d 514 (Fla. 1981). This issue may therefore not be properly preserved. See, Steagald v. United States, __U.S.__, 101 S.Ct. 1642 (1981); United States v. Ramsey, 431 U.S. 606, 611 at n.7 (1977); United States v. Santana, 427 U.S. 38, 41, at n.2 (1976).

Recently, in County Court of Ulster County, New York v. Allen, __U.S.__, 99 S.Ct. 2213 (1979), the defendant/petitioner upon a due process claim had sought to overturn New York Penal Law §265.16(3), which provides that the presence of a firearm in a vehicle is presumptive of its possession by the occupants. 99 S.Ct. at 2217. The United States Court of Appeals for the Second Circuit had held that the statute was, "unconstitutional on its face." 568 F.2d 998 at 1009. In reversing the Circuit Court of Appeals, the Allen Court again emphasized that:

> "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. A limited exception has been recognized for statutes that broadly prohibit speech protected by the

First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. That justification, of course, has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons." (Emphasis added, citations omitted).

99 S.Ct. at 2223.

See, California Bankers Association v. Shulty, 416 U.S. 21, at 71-72 (1974). The Allen court went on to consider the facts and circumstances before it and found that the New York Statute constitutional as applied. 99 S.Ct. at 2226-2230.

In the present case, the trafficking statute penalties do not apply to the Defendants. The Defendants have been convicted of only a second degree felony under Section 777.04(4)(b) Florida Statutes, which apparently has no mandatory minimum requirement and therefore also does not involve any requirements for mitigation under Section 893.135(3).

Under Allen, the Defendants may not complain about the rights of others and therefore the present complaints are moot. See, also, Fuller v. Oregon, 417 U.S. 40 (1974); Street v. New York, 394 U.S. 576 (1969); Durley v. Mayo, 351 U.S. 277 (1956); Stembridge v. Georgia, 343 U.S. 541 (1952); Lynch v. New York, 293 U.S. 52, 55 (1934)(independent state ground).

B. NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendants' constitutional complaints of are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United States, __U.S.__, 100 S.Ct. 1358 (1980) the defendant, a heroin dealer, refused to cooperate with police in the further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a more severe sentence than if the defendant had co-operated. Id. In sustaining the more severe sentence the Roberts court held 1) that part of the defendants rehabilitation would be cooperation with law-enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As in Roberts, in the case

at bar there is not a shred of evidence that the Defendants have been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibition, the testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunningham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See, United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether the Defendants have a difficult choice but whether they have a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendants only with a difficult

choice and is therefore not in violation of any constitutional precepts.

The Defendants' claims that Section 893.135 denys due process and the statute imposes cruel and unusual punishment are similarly wholly without merit. In Bordenkircher v. Hayes, 434 U.S. 357 (1978) the prosecutor in pretrial plea bargaining had told the defendant, the defendant's plea to a term of five years in prison would be acceptable, but that if the defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the defendant as an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id at 360. In framing the issue, the Bordenkircher court specifi-

cally held that:

"As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." [Emphasis added].

Id.

Addressing the principles which are clearly controlling herein, the court further opined that:

"By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv.L.Rev. 564 (1977). Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct., at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed.2d 162.

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible--attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Emphasis added].

Id, at 364.

Relying upon its decision in Borden-Kircher, in Corbitt v. New Jersey, __U.S.__, 99 S.Ct. 492 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 99 S.Ct. at 495. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discretion of the trial court. 99 S.Ct. at 495-497. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term

under the statute. 99 S.Ct. at 495-496. In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth and Fourteenth Amendments, the Corbitt court held that:

"As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only "the possibility or certainty. . . [of] a lesser penalty than the sentence that could be imposed, after a trial and a verdict of guilty. . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463, 1470, 25 L.Ed.2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher thus:

"While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult

choices [is] an evitable'--and permissible--' attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' Chaffin v. Stynchcombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." 434 U.S., at 364, 98 S.Ct., at 668."

99 S.Ct. at 498.

In the case at bar, after their convictions, sentences and appeals, the Defendants have two choices under the statute. They may either serve the lawful term of their imprisonment or they may seek the benefit of mitigation of their sentences by substantial cooperation with the authorities. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing the Defendants with the choice of "grim alternatives" upon their convictions for trafficking in narcotics in Florida.

Trafficking in narcotics is indeed a heinous crime, which is tearing at the very fabric of our society. Clearly the legislative purpose in providing more severe penalties for such a crime has a rational basis and therefore is manifesting devoid of any defect under an equal protection claim. See, anaylsis in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also, Albernaz v. United States, __U.S.__, 101 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, __U.S.__, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court may intrude. Id.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this ____ day of January, 1982, at Tallahassee, Leon County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128

(305) 377-5441

Appellant's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-960

IN THE

Supreme Court of the United States

October Term 1981

RONALD C. LOCKE and LESLIE L. FLAGE,
Appellants,

v.

STATE OF FLORIDA,
Appellee,

ON APPEAL FROM
THE FIRST DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

LARRY G. TURNER
Counsel of Record
THOMAS W. KURRUS
Law Office of Larry G. Turner, P.A.
204 West University Avenue
Suite 6
Post Office Box 508
Gainesville, Florida 32602
(904) 375-4460

MICHAEL L. BRYANT
JACK M. ROSS
Law Office of Birr, Bryant & Saier, P.A.
204 West University Avenue
Suite 4
Post Office Drawer 1168
Gainesville, Florida 32602
(904) 375-1000
Attorneys for Appellants

Brief In Opposition To
Appellee's Motion To Affirm

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PREFACE

In this brief, Appellants RONALD C. LOCKE and LESLIE L. FLAGE will be referred to as the Defendants; Appellee, as the State. See APPELLEE'S MOTION TO AFFIRM, vi (Preface).

In the section entitled "OPINIONS BELOW," the State cites several decisions by the Florida supreme court and alludes to the possibility that "one or more" of these decisions may have formed the basis for the First District Court's ruling in the instant case. APPELLEE'S MOTION TO AFFIRM, 1.

Defendants respectfully disagree. Every decision cited by the State postdated the "per curiam" affirmance in the instant cause--with the only exceptions being Benitez and State v. Yu, 400 So2d 762 (Fla. 1981)(inapplicable to instant case--limited to constitutional challenges

regarding trafficking in cocaine). See ORDER of First District Court of Appeal, entered 22 May 1981, in Appellants' JURISDICTIONAL STATEMENT, a-1. Cf. a-16. Benitez stood as sole authority for the Order appealed from.

I. DEFENDANTS' PROSECUTION FOR TRAFFICKING, WHICH RESULTED IN THEIR CURRENT INCARCERATION, PRESENTS THIS COURT WITH A LIVE CONTROVERSY: DEFENDANTS' CLAIMS FOR RELIEF ARE NOT MOOT.

It is well-settled that the claims raised by the defendant in a criminal case are not moot--even after expiration of sentence--because the collateral consequences of his conviction continue to cause injury long after his release.[1]

The Defendants at bar, now imprisoned for eight and ten years, have appealed to this Court far in advance of the time when mootness becomes an issue. Neither do the Defendants' convictions for attempted trafficking render their

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1. E.g., Pennslyvania v. Mimms, 434 U.S. 106, 108 n. 3 (1977); Benton v. Maryland, 395 U.S. 784, 790-91 (1969); Sibron v. New York, 392 U.S. 40, 50-52 (1968); see, Note, The Mootness Doctrine in the Supreme Court, 88 Harv.L.Rev., 373, 381 n. 34 (1974).

claims moot. The law concerning the crime of attempt is clear: One cannot be convicted of attempting to violate a statute which is unconstitutional.[2] Certainly, the Defendants have standing to assail the constitutional deficiencies of the statute which they were convicted of attempting to violate. See, Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

From the outset of their prosecution, Defendants apprehensively refused to comply with the trafficking statute's "substantial assistance" provision and serve as

---

2. See, e.g., Norton v. Shelby County, 118 U.S. 425, 442 (1886)("An unconstitutional statute is not a law"); Ex parte Knight, 41 So 786, 789 (Fla. 1906) (if statute is void, conviction is invalid); Turner v. State, 130 So 617, 619 (Fla. 1930)(crime of attempt means nothing unless defined by specific intent to consumate a particular crime); Sayer, Criminal Attempts, 41 Harv.L.Rev., 821, 839-42 (1928).

undercover police agents, claiming it violates their Fifth Amendment right against self-incrimination. Defendants also urged that the statute's sentencing scheme, with its mandatory penalties clearly calculated to compel them to serve as informants, violates their Fifth, Eighth and Fourteenth Amendment rights guaranteed by the United States Constitution.

These are precisely the constitutional rights which Defendants continue to assert on this appeal.

But the State says no: Defendants no longer have those rights to assert--because they managed not to lose those rights; they worked a deal with the prosecution, instead. This Court, however, has rejected the contention that Defendants must demonstrate a nexus between the rights they assert and the

injuries they claim. Duke Power Co. v. Carolina Env. Study Gp., 438 U.S. 59, 78-79 (1978). Defendants need not be sentenced under the challenged provisions of the trafficking statute in order to have standing to challenge those provisions.

Rather, the test is whether a nexus exists between the challenged provisions and the injuries claimed. 438 U.S. at 72. And Defendants easily satisfy this test: but for Defendants' determination not to suffer the constitutional deprivations inherent in the trafficking statute's sentencing scheme, they would not have sacrificed their rights to trial by jury, confrontation of witnesses and the right not to assist the State in proving them guilty, by pleading to attempted trafficking.

From the moment they were charged with trafficking, Defendants confronted the severe penalties of this "penalty-

oriented statute." State v. Benitez, 395 So2d 514, 517 (Fla. 1981). They succumbed to the pressure which the legislature indisputedly intended those penalties to pose; they pled, but only because the prosecution wielded an unconstitutional statute at the bargaining table, and promised Defendants a right to appeal. Thus, "a 'fairly traceable' causal connection (exists) between the claimed injury"--Defendants' trial-less convictions and sentences for attempted trafficking--"and the challenged conduct," i.e., the penalty provisions of the trafficking statute.[3]

A recent decision by this Court, authored by Mr. Chief Justice Burger,

3. Duke Power Co. v. Carolina Env. Study Gp., 438 U.S. 59 (1978); see also, Allee v. Medrano, 416 U.S. 802, 810 (1974).

should finally dispose of the State's contention that Defendants lack standing to challenge the statute's penalty provisions. Babbitt v. Farm Workers, 442 U.S. 289 (1979), holds that a party who establishes merely a genuine threat of prosecution under a statute, which he claims is unconstitutional, has standing to challenge the penalty provisions, as well. 442 U.S. at 303.

These Defendants--both arrested and prosecuted for violating Florida's trafficking statute--have surpassed this threshold test for standing.[4] They

4. E.g., Carey v. Population Services International, 431 U.S. 678, 682-83 and n. 3 (1977); Cramp v. Board of Public Instruction, 368 U.S. 278, 283-84 (1961); see, Andrus v. Allard, 444 U.S. 51, 64 n.21 (1979)(federal regulations challenged).

have, in fact, sustained direct injury from the statute's enforcement:[5] Faced with much more than a genuine threat of prosecution for trafficking, Defendants relieved the State of its burden to prove them guilty beyond any reasonable doubt, and were convicted; they submitted themselves to incarceration for many years.

5. See, Babbitt v. Farm Workers, 442 U.S. 289, 298-99 (1979). Unlike the penalty provisions of the statute contested in Babbitt, the penalty provisions of Florida's trafficking statute--which are embedded in each subsection of §893.135, Florida Statutes--have been authoritatively construed by the Florida supreme court. See, e.g., State v. Benitez, 395 So2d 514 (Fla. 1981). Thus, this Court need not postpone review of the instant case; the possibility that the Florida courts would construe these provisions so as to alleviate the need to reach the constitutional issues has been ruled out. Compare, Babbitt, 442 U.S. at 306-308, with Cramp v. Board of Public Instruction, 368 U.S. 278, 285 (1961).

And each day spent in prison deprives them of the Federal constitutional rights which the Florida courts have refused to recognize, although asserted by these Defendants from the time they were charged.[6]

Convicted and sentenced, these Defendants have lost many of the rights reserved for free men. But they retain one most important right. The right to

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6. To the extent ambiguity continues to plague the operation of the statute's "substantial assistance" provision, that would support immediate review. Defendants have challenged that provision as unconstitutionally vague, because of the vast, unreviewable "discretion" it gives the prosecutor. See, e.g., State v. Werner, 402 So2d 386, 387 (Fla. 1981); State v. Stone, 402 So2d 1330, 1332 (Fla. 1st DCA 1981). When extensive adjudications, under the impact of a variety of factual situations, would be required to bring a challenged statute within the bounds of constitutional certainty, abstension may be improper. Babbitt, 442 U.S. at 308; accord, Wardius v. Oregon, 412 U.S. 470, 477-78 (1973) (uncertainty about application of statute presents considerable risk of injury which entitles defendant to appeal without first complying with statute's demands).

appeal to this Court; to obtain objective review of Florida's scheme for stripping them of constitutional guarantees and enslaving them as police agents.

II. THE STATE COURTS HAVE ADJUDICATED DEFENDANTS' CLAIMS, BASED UPON THE FACIAL VALIDITY OF THE TRAFFICKING STATUTE; THE ISSUES PRESENTED ARE NOT TOO "ABSTRACT" FOR THIS COURT TO ENTERTAIN JURISDICTION.

The State raised no objections to review of the Federal questions presented by this appeal when Defendants pressed their claims in the state courts below.[7]

7. The State submits that its failure to raise jurisdictional arguments during proceedings in the courts below may constitute a waiver of these issues, for purposes of this appeal. APPELLEE'S MOTION TO AFFIRM 4. Although Defendants happily would embrace that theory, and move on to the merits of their case, jurisdictional issues are not the State's to waive. Had the State completely failed to devise a single argument against this Court's jurisdiction, that would not relieve the need for this Court, sua sponte, to determine its power to hear the case.

The issues were fully litigated, without protest--until Defendants sought their first review of the trafficking statute before a Federal Court.[8]

Now, the State contends the issues are too "abstract," "hypothetical," and that it would be improper for this Court to decide claims based upon the facial validity of the statute. Federal law, however, does not insist that the State of Florida was wrong in not requiring Defendants to be sentenced under the trafficking statute in order to raise their constitutional claims. New Jersey v. Portash, 440 U.S. 450, 456 (1979).

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8. The Florida Constitution does not contain a provision equivalent to the Federal Case or Controversy Clause of Article III. Nonetheless, Florida courts have incorporated the doctrine of standing into state jurisprudence, relying heavily upon the decisions of this Court. See, e.g., Sandstrom v. Leader, 370 So2d 3, 4-5 (Fla. 1979). While the State's failure to raise the issue of standing below is not conclusive, its forebearance should, at least, cast doubts on the strength of its arguments.

Nor does federal law preclude this Court from reviewing the final judgment of the State's highest court, sub judice, merely because that judgment determined only the facial validity of the statute.[9] Because this case satisfies the threshold requirements of justiciability, Portash holds review is proper when Defendants have (1) timely presented their constitutional claims to the trial court, (2) state law affords review of the claims on appeal,

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9. The Florida supreme court has held that when a defendant pleads, specifically reserving the right to appeal the constitutionality of the charging statute, the appellate court may determine only the facial validity of the statute. Vernold v. State, 376 So2d 1166, 1167 (Fla. 1979). Furthermore, had the First District Court of Appeal determined Defendants' claims were neither justiciable nor dispositive of the lawfulness of their convictions, Florida law required dismissal of their appeals, rather than affirmance of the trial court. Brown v. State, 376 So2d 382, 385-86 (Fla. 1979).

and (3) the state appellate court adjudicated the federal constitutional questions.[10]

The Defendants' JURISDICTIONAL STATEMENT evidences that their case fits squarely within the doctrine established by Portash. Thus, this Court may undertake review of the facial validity of the trafficking statute, in full comity with state law.[11]

In Portash, the Court decided the Defendant's Fifth Amendment claim, even

10. See also, Lefkowitz v. Newsome, 420 U.S. 283 (1975); Brooks v. Tennessee 406 U.S. 605 (1972); Benton v. Maryland, 395 U.S. 784, 792-93 (1969).

11. Contrary to the State's contentions, this Court has found state statutes to be facially invalid when First Amendment rights were not involved. See, e.g., Carey v. Brown, 447 U.S. 455 (1980)(equal protection); Carey v. Population Services International, 431 U.S. 678 (1977)(due process): Brooks v. Tennessee, 406 U.S. 605 (1972)(right against self-incrimination); Berger v. New York, 388 U.S. 41 (1967)(Fourth Amendment right to privacy).

though he had remained silent, refusing to risk self-incrimination. These Defendants, likewise, are entitled to have their Fifth Amendment claims adjudicated on appeal, prior to being compelled to choose between incriminating themselves under the statute's "substantial assistance" provision, or suffering any penalty for their refusal to do so.[12]

As Mr. Justice Marshall observed, on behalf of a unanimous Court in United States v. Batchelder, no one may be required--at risk of life, liberty or property--to speculate as to the penal consequences of violating a given statute. 442 U.S. 114, 123 (1979).

12. See, Marchetti v. United States, 390 U.S. 39, 52-55 (1968); Albertson v. Subversive Activities Control Board, 382 U.S. 70, 74-77 (1965); New Jersey v. Portash, 440 U.S. 450, 456 (1979); and Brooks v. Tennessee, 406 U.S. 605, 610-11 (1972).

The Florida courts followed that principle by adjudicating the Defendants' claims. No reason exists for this Court to abstain.

The Defendants bargained for the right to appeal the constitutionality of the trafficking statute. This Court should scrutinize closely the State's arguments for reneging at this late stage.[13] Accord, Santobello v. New York, 404 U.S. 257, 262 (1971).

13. County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979), provides additional authority for this Court to examine the facial validity of the trafficking statute. Allen made clear that mandatory presumptions must be reviewed for their facial validity, 442 U.S. at 157-58; and Florida's statute contains two mandatory presumptions. The first presumption is that every defendant can provide "substantial assistance"; the second is the presumption of incorrigibility for failure to do so.

These presumptions are mandatory. The statute, on its face, denies every defendant any opportunity in mitigation to assert his right against self-incrimination; or to offer proof of his fear of retaliation; or to otherwise explain his inability to render "substantial assistance." Clearly, "the presumption(s') constitutional validity is logically divorced from (the) facts and based on the presumption(s') accuracy in the run of cases." Id at 159.

III. THIS COURT SHOULD TAKE JURISDICTION TO RESOLVE THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED, PARTICULARLY IN LIGHT OF THE CONFLICTING DECISIONS ENGENDERED BY ROBERTS V. UNITED STATES.

Considering the growing number of conflicting decisions among the state and federal courts, construing and often misapplying, Roberts v. United States, 445 U.S. 552 (1980), it is difficult to imagine a federal question bearing more substantial impact on this nation's criminal justice system.

The concerns raised by Mr. Justice Marshall in his dissent, id. at 563-72, have now materialized.

State court decisions have erroneously interpreted Roberts as authority for use of enhanced penalties coupled with an

offer of sentence reduction if the defendant will serve as an informant.[14] Several of these decisions, including Benitez, have misread Roberts as holding that a defendant's Fifth Amendment privilege is not violated when he must choose between relinguishing that right--to assist the authorities--or recieve an enhanced penalty for his refusal to do so.[15]

14. Compare Corbitt v. New Jersey, 439 U.S. 212 (1978), wherein the Court distinguished between affording "leniency" and "punishment." Id. at 223-24.

This begs the question of whether "an opportunity of leniency" is really a wolf in sheep's clothing. Mandatory life imprisonment received by Corbitt for first degree murder is not an unusual punishment, if one were to survey the various state statutes. However, the inflated mandatory minimums, without possibility of parole, under Florida's trafficking statute are virtually unlike the penalties attached to identical crimes in other states. Unlike Corbitt, the Florida legislature originally inflated the penalties, to be deflated, to avoid the enhancement problem. By doing so, th possibility of leniency appears to be a reward. It is obvious that this is no more than a facade.

15. See, e.g., People v. Hooks, 300 NW2d 677, 679 (Mich. App. 1981)(Roberts, held Fifth Amendment rights not violated where court asks defendant to inform in exchange for favorable disposition);

The most serious conflict among both state and federal courts relying upon Roberts concerns the enhancement of sentence when the defendant refuses to cooperate, claiming fear of physical retaliation. A graphic case presenting this dilemma appears in Commonwealth v. Wright, 410 NE2d 738 (Mass. App. 1980). There, defendant Wright expressed fear of retaliation if he testified against a co-defendant; the trial court refused Wright's explanation, but offered a sentence reduction if he changed his mind. While in jail, Wright agreed; but before he could testify, his face was "shattered" with a lead pipe, causing "extensive nerve damage and disfigurement."

15. (cont.)
Brown v. State, 617 SW2d 234, 239 n. 3 (Tex. Cr. App. 1981)(dissenting opinion)(Roberts held defendant's silence and non-cooperation could be used against him in assessment of punishment); accord, People v. Poll, 408 NE2d 212, 214 (Ill. 1980)(Roberts permits use of defendant's unproven criminal conduct as grounds for enhancing sentence).

Id. at 739. Despite this evidence, the court again refused to consider Wright's fears--until ordered to by the appellate court. Although the appellate court properly cited Roberts to support its remand, this Court never contemplated such drastic proof would be demanded to rebut the presumption of incorrigibility which may attach to defendants who decline to turn informant.[16]

16. See also Schmid v. State, 615 P2d 565, 577 n. 16 (Alaska 1980)(remanded for trial court to state grounds for sentence; wherein court found defendant would be endangered by cooperating, but refused to weigh that in defendant's favor); and compare United States v. Dawson, 642 F2d 1060 (7th Cir. 1981)(holding that trial court, having offered to reduce defendant's sentence if he turned informant, properly denied sentence reduction when defendant claimed fear of retaliation--despite court's refusal to hear evidence), with United States v. Bradford, 645 F2d 118 (2d Cir. 1981)(holding that once defendant asserts fear of retaliation, court must grant an evidentiary hearing).

CONCLUSION

A fundamental distinction exists between a plea entered to avoid a harsh--but constitutionally permissible--mandatory sentence; and a plea extracted under the genuine threat of a penalty scheme condemnable by the United States Constitution.

These Defendants' pleas to attempted trafficking constitute the price exacted by the prosecution for Defendants' right to appeal the trafficking statute to this Court.

The uncontested legislative intent--to use the statute's mandatory penalties to bend the will of defendants; to strip them of their constitutional rights and conscript them as police agents; to bind the hands of any trial court which tries to interfere--trafficks in trompe l'oeil. The sleight of hand is obvious. Yet,

Florida's highest court has sanctioned the scheme.

The time for objective review is now.

Wherefore, upon the foregoing, the Appellants RONALD C. LOCKE and LESLIE L. FLAGE, pray that this Honorable Court will grant jurisdiction, or in the alternative, note probable jurisdiction, and set this case for full briefing and argument.

Respectfully submitted,

LARRY G. TURNER
Counsel of Record
THOMAS W. KURRUS
Law Offices of Larry G. Turner, PA
204 W. University Avenue, Suite 6
Post Office Box 508
Gainesville, Florida 32602
(904) 375-4460

MICHAEL BRYANT
JACK M. ROSS
Birr, Bryant & Saier
204 W. University Avenue, Suite 4
Post Office Box 1168
Gainesville, Florida 32602
(904) 375-1000

COUNSEL FOR APPELLANTS

14 February 1982